WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOL. III

WISCONSIN
CRIMINAL
JURY INSTRUCTIONS
COMMITTEE

UNIVERSITY OF WISCONSIN
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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME III

Wisconsin Criminal Jury Instructions Committee

University of Wisconsin Law School

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1805 CONCEALING IDENTITY

[INSTRUCTION RENUMBERED — SEE WIS JI-CRIMINAL 994]

COMMENT

Wis JI-Criminal 1805 was originally published in 1974 and revised in 1979 and 1981. It was renumbered Wis JI-Criminal 994 in 1986. This note was republished without change in 1995.

1985 Wisconsin Act 104 (effective date: November 28, 1985) renumbered the statute that penalizes committing a crime while identity is concealed. Former § 946.62 was renumbered § 939.641. The revision also clarified the point over which there had been some confusion: that "concealing identity" is not a separate criminal offense but is a fact that increases the penalty for the underlying crime.

The suggested uniform instruction was renumbered to correspond to the legislative change.

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1810 CONCEALING DEATH OF CHILD — § 946.63

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1810 was originally published in 1974. It was withdrawn in 1989.

This instruction was withdrawn because the statute with which it deals was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The offense was recreated, with minor substantive change, as § 948.23. See Wis JI-Criminal 2154.

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1812 COMMUNICATING WITH A JUROR — § 946.64

Statutory Definition of the Crime

Section 946.64 of the Criminal Code of Wisconsin is violated by one who, with intent to influence a person summoned or serving as juror, in relation to any matter which is before or which may be brought before that person, communicates with that person otherwise than in the regular course of proceedings in the trial or hearing of that matter.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of juror) was (summoned) (serving) as a juror.
2. The defendant communicated with (name of juror) other than in the regular course of proceedings in a trial or hearing.
3. The defendant communicated with (name of juror) with intent to influence (name of juror) in relation to any matter which (was before) (might have come before) (name of juror).

   "With intent to" means that the defendant had the mental purpose to influence (name of juror).[1]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1812 was originally published in 1995. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 946.64, Communicating with Jurors. There are no reported decisions interpreting the statute, which was created as part of the 1956 revision of the Criminal Code. Often referred to as "jury tampering," the offense was known at common law as "embracery." See Platz, "The Criminal Code," 1956 Wis. L. Rev. 350, 380.

1. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1815 OBSTRUCTING JUSTICE — § 946.65

Statutory Definition of the Crime

Obstructing justice, as defined in § 946.65 of the Criminal Code of Wisconsin, is committed by one who, for a consideration, knowingly gives false information to any officer of any court with intent to influence the officer in the performance of official functions.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant gave false information to (name of officer).

2. (Name of officer) was an officer of a court.[1]

3. The defendant knowingly gave false information to an officer of the court.

   This requires that the defendant knew the information was false and knew that (name of officer) was an officer of a court.[2]

4. The defendant gave false information with intent to influence (name of officer) in the performance of official functions.

   "With intent to influence" means that the defendant had the mental purpose to influence the officer.[3]

   "Official functions" are duties that an officer of a court is employed to perform.[4]

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5. The defendant gave false information for a consideration.

"For a consideration" means that another person provided or agreed to provide some benefit to the defendant for giving false information.[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1815 was originally published in 1988 and revised in 1995. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. Section 946.65(2) provides: "Officer of any court includes the judge, reporter, bailiff, and district attorney." This provides authority for advising the jury that, for example, a judge is an officer of a court.

2. Section 939.23(2) provides that "'know' requires only that the actor believes that the specified facts exist."

3. Section 939.23(4) provides that "with intent to" means that the actor has the purpose to cause the result specified or is aware that his or her conduct is practically certain to cause that result. See Wis JI-Criminal 923A and 923B.

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4. The definition of "official functions" is adapted from the one provided for "acting in official capacity" in Wis JI-Criminal 915.

5. The definition of consideration is adapted from the decision in State v. Howell, 141 Wis.2d 58, 414 N.W.2d 54 (Ct. App. 1987), where the court concluded that "only conduct which involves a third party contracting with another to give false information to a court officer . . . is proscribed by the statute." 141 Wis.2d 58, 62. Howell's conduct was not covered, therefore, since he had provided false information to the court during a hearing on his bail reduction request. The court found there was no consideration because, "in a contractual sense, the false information did not induce the court to carry out its statutory function to litigate a bail reduction request. Regardless of the quality of the information given, the trial court would have made a bail determination." 141 Wis.2d 58, 62. Further, the court held that some concerted activity between two or more persons is required; a person providing false information to advance his own interests is not covered by the statute.

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1825 SIMULATING LEGAL PROCESS — § 946.68

Statutory Definition of the Crime

Simulating legal process, as defined in § 946.68 of the Criminal Code of Wisconsin, is committed by one who sends or delivers to another person any document which simulates legal process.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant sent or delivered a document to another person.
2. The document simulated legal process.

"Simulate" means to imitate or have the appearance of without being genuine.[1]

"Legal process" includes a subpoena, summons, complaint, warrant, injunction, writ, notice, pleading, order, or other document that directs a person to perform or refrain from performing a specified act and compliance with which is enforceable by a court or governmental agency.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE CLASS D FELONY DEFINED IN SUB. (1r)(b) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE DOCUMENT WAS SENT OR DELIVERED WITH INTENT TO INDUCE PAYMENT OF A CLAIM:[3]

[If you find the defendant guilty, you must answer the following question "yes" or "no":

Did the defendant send or deliver the document with intent to induce payment of a claim?

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the defendant sent or delivered the document with intent to induce payment of a claim.]

ADD THE FOLLOWING IF THE CLASS D FELONY DEFINED IN SUB. (1r)(c) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE DOCUMENT SIMULATED CRIMINAL PROCESS:[4]

[If you find the defendant guilty, you must answer the following question "yes" or "no":

Did the document simulate criminal process?

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the document simulated criminal process.]

COMMENT

Wis JI-Criminal 1825was originally published in 1997. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of § 946.68. The basic offense is a Class I felony. It increases to a Class H felony in two situations: where the document is sent or delivered with intent to induce payment of a claim [see sub. (1r)(b)]; and where the document simulates any criminal process [see sub. (1r)(c)]. The Committee recommends handling the Class H felonies by adding a special question to the instruction for the basic offense that asks the jury to determine if the aggravating factor is established.

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1. The definition of "simulate" is based on the one provided in The American Heritage Dictionary of the English Language, with the addition of "without being genuine."

2. This is the definition provided in sub. (1g) of § 946.68.

3. As with similar provisions that increase the maximum penalty for a criminal offense, the Committee concluded that the facts that increase the penalty for this offense to a Class H felony should be submitted to the jury as a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of simulating legal process under § 946.68 of the Wisconsin Statutes at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant send or deliver the document with intent to induce payment of a claim?"

4. As with similar provisions that increase the maximum penalty for a criminal offense, the Committee concluded that the facts that increase the penalty for this offense to a Class H felony should be submitted to the jury as a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of simulating legal process under § 946.68 of the Wisconsin Statutes at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the document simulate criminal process?"

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1830 IMPERSONATING A PEACE OFFICER, FIRE FIGHTER, OR OTHER EMERGENCY PERSONNEL — § 946.70(1)

Statutory Definition of the Crime

Impersonating a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder), as defined in § 946.70(1) of the Criminal Code of Wisconsin, is committed by one who impersonates a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder) with intent to mislead others into believing that the person is actually a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant impersonated a (peace officer) (fire fighter) (emergency medical services practitioner)[1] (emergency medical responder).[2]

   To "impersonate" means to (assume the identity or characteristics of) (represent oneself to be) (pretend to be) another person without authority to do so.[3] (One may impersonate another by verbal declarations as well as by obvious physical impersonations as in wearing a badge or a uniform.)[4]

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[A "peace officer" is a person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.][5]

2. The defendant impersonated a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder) with intent to mislead[6] (another person) (other persons) into believing the defendant was actually a (peace officer) (fire fighter) (emergency medical services practitioner) (emergency medical responder).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.[7]

If you find the defendant guilty, you must answer the following question:

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Did the defendant act with intent to [commit] [aid and abet the commission of] the crime of (name crime) ?

(Name crime) as defined by Section _____ of the Criminal Code of Wisconsin is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime) .[8]

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1830 was originally published in 1980 and revised in 1986, 1995, 2009, and 2013. This revision was approved by the Committee in December 2017; it reflects changes in terminology made by 2017 Wisconsin Act 12.

This instruction is drafted for a violation of subsec. (1) of § 946.70 which is a Class A misdemeanor. The maximum penalty for the basic offense is increases to a Class H felony if the person acts "with the intent to commit or aid and abet the commission of a crime. . . ." § 946.70(2). The instruction provides a special question to be added if the Class H felony is charged. Wis JI-Criminal 1831 formerly provided an instruction for the felony offense; it has been withdrawn.

1985 Wisconsin Act 97 amended § 946.70 by substituting the word "impersonate" for "personate." Since the two words have essentially the same meaning, it is assumed that no change in meaning was intended.

2011 Wisconsin Act 276 amended § 946.70 by creating subs. (1)(b), (c), and (d), extending the coverage to include impersonating a fire fighter, an emergency medical technician, and a first responder. [Effective date: April 24, 2012.]

2017 Wisconsin Act 12 [effective date: June 23, 2017] changed the terminology used in the statute from "emergency medical technician" to "emergency medical services practitioner" and from "first responder" to "emergency medical responder."

1. Section 946.70(1)(c) refers to "an emergency medical services practitioner as defined in s. 256.01(5)."

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2. Section 946.70(1)(d) refers to "an emergency medical responder as defined in s. 256.01(4p)."

3. Webster's Third New International Dictionary.

4. This definition was adopted when the instruction was first published in 1980. It was based on one found in 35 C.J.S. False Personation § 3 (1960).

5. This is the definition provided in Wis. Stat. § 939.22(22).

6. The phrase "with intent to" means that the actor either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

7. Subsection (2) of § 946.70 provides that the penalty increases to a Class H felony if the person acts "with the intent to commit or aid and abet the commission of a crime . . ." If the offense is charged as a Class H felony, the special question should be added to assure a jury finding on the penalty-increasing fact. If the offense is charged as a Class A misdemeanor, the instruction should be given without the special question.

8. The Committee recommends instructing on the elements of the crime that the defendant is alleged to have intended to commit or aid and abet. For definition of "aid and abet" see Wis JI-Criminal 400. The situation is similar to that presented by § 940.44, Intimidation of a Victim, in that elements of a different crime become incorporated in the charged offense.

In State v. Thomas, 161 Wis.2d 616, 468, N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

> The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

Also see State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698, reaching the same conclusion with respect to bail jumping under § 946.49.

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1831 IMPERSONATING A PEACE OFFICER, FIRE FIGHTER, OR OTHER EMERGENCY PERSONNEL WITH INTENT TO COMMIT A CRIME — § 946.70(2)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 1831 was originally published in 1986 and revised in 1995, 2009 and 2013. Its withdrawal was approved by the Committee in October 2017.

Wis JI-Criminal 1831 provided a separate instruction for a violation of subsec. (2) of § 946.70 which is a Class H felony and requires that a person violating § 946.70(1) act "with the intent to commit or aid and abet the commission of a crime. . . ." The additional facts necessary for the Class H felony have been added to Wis JI-Criminal 1830 as a special question.

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1832 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(1)

1833 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(2)

1834 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(3)

1835 INTERFERENCE WITH CUSTODY OF A CHILD — § 946.71(4)

1835A INTERFERENCE WITH CUSTODY OF A NONMARITAL CHILD — § 946.71(4)

1838 INTERFERENCE WITH THE PARENTAL RIGHTS OF THE OTHER PARENT: CONCEALING A CHILD — § 946.715(1)(a)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1832, 1833, 1834, 1835, and 1835A were originally published in 1985.

Wis JI-Criminal 1838 was originally published in 1987 and was revised in 1988.

All the instructions were withdrawn in 1989 because the statutes with which they deal, §§ 946.71 and 946.715, were repealed by 1987 Wisconsin Act 332, effective July 1, 1989. Section 948.31, Interference With Custody By Parent Or Others, was created in place of the repealed provisions. See Wis JI-Criminal 2166 through 2169.

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1848 UNEMPLOYEMENT INSURANCE FRAUD: MAKING A FALSE STATEMENT TO OBTAIN A BENEFIT PAYMENT — § 108.24(1)(a)

Statutory Definition of the Crime

Unemployment insurance fraud, as defined in § 108.24(1)(a) of the Wisconsin Statutes, is committed by any person who knowingly makes a false statement or representation to obtain any benefit payment under Chapter 108, either for himself or herself or for any other person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained a benefit under Chapter 108 for (himself) (herself) (another person), by making a (statement) (representation).

2. The (statement) (representation) to obtain a benefit under Chapter 108 was false when made.

3. The defendant knew the (statement) (representation) to obtain a benefit under Chapter 108 was false when made.

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Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH FRAUDULENTLY SECURING MORE THAN $2,500 AND THE EVIDENCE WOULD SUPPORT THAT FINDING.[1]

If you find the defendant guilty, you must also determine beyond a reasonable doubt the value of any unemployment insurance benefits for which the defendant was not eligible and insert that amount in the verdict.[2]

Determining Value

("Was the value of any benefit obtained more than $10,000?"

Answer: "yes" or "no.")

("Was the value of any benefit obtained more than $5,000?"

Answer "yes" or "no.")

("Was the value of any benefit obtained more than $2,500?"

Answer "yes" or "no.")

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Before you answer "yes," you must be satisfied beyond a reasonable doubt that the value of any benefit obtained was more than the amount stated in the question.

COMMENT

Wis JI-Criminal 1848 was approved by the Committee in July 2018.

This instruction is for criminal violations of § 108.24(1)(a), making a false statement to obtain unemployment insurance benefit payments. The penalty structure was modified by 2017 Wisconsin Act 147 [effective date: April 1, 2018]. Fraudulently obtaining unemployment benefits not exceeding $2,500 is a Class A misdemeanor. The penalty increases to a felony if the value of the benefit received exceeds specified amounts. There are four ranges of criminal penalties, depending on the value of the benefits or payments obtained. See sub. (2) of § 108.24. The penalty issue is addressed by adding a special question at the end of the instruction. See footnote 1, below.

1. The jury must make a finding of the value of the unemployment insurance benefit payment if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt."

2. The penalties for violations of § 108.24(1)(a) depend on the value of the payment or benefit. The jury should be asked to determine that value. (See, by analogy, Wis JI-Criminal 1441 Theft, footnote 8.) The applicable penalty is capped by the crime charged in the complaint or information. The penalties are specified in sub. (1)(b) as follows:

Value of benefit	Penalty
less than $2,500	Class A misdemeanor
more than $2,500 but does not exceed $5,000	Class I felony
more than $5,000 but does not exceed $10,000	Class H felony
more than $10,000	Class G felony

The Committee concluded that if the securing of less than $2,500 is charged, the jury need not make a finding of value.

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1850 PUBLIC ASSISTANCE FRAUD: MAKING A FALSE STATEMENT IN AN APPLICATION FOR PUBLIC ASSISTANCE — § 946.93(2)

Statutory Definition of the Crime

Public assistance fraud, as defined in § 946.93(2) of the Wisconsin Statutes, is committed by a person who intentionally makes or causes to be made any false statement or representation of material fact in any application for or receipt of public assistance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (made) (caused to be made) a (statement) (representation) of material fact in an application for or receipt of public assistance.

   The [statement] [representation] claimed to have been made in this case is: (specify the alleged statement or representation) .

   A material fact is one that affects eligibility for or the amount of public assistance.[1]

   "Public assistance" means any aid, benefit, or services provided under Chapter 49 of the Wisconsin Statutes.[2]

2. The (statement) (representation) of material fact was false when made.

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3. The defendant knew the (statement) (representation) of material fact was false when made.[3]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1850 was originally published in 1980 and revised in 1988 and 1995. This revision was approved by the Committee in October 2014; it reflects the repeal and recreation of former § 49.95 as § 946.93.

This offense was originally defined in § 49.12; that statute was renumbered § 49.95 by 1995 Wisconsin Act 27. 2013 Wisconsin Act 226 [effective date: April 10, 2014] repealed § 49.95 and recreated it as § 946.93. The offense definition in current § 946.93(2) is the rough equivalent of the one provided in former § 49.95(1).

This instruction is for criminal violations of § 946.93(2), which are Class A misdemeanors. The penalty for this offense no longer depends on the value of the assistance received.

1. The definition of "material" is consistent with the discussion of that term in State v. Williams, 179 Wis.2d 80, 87-88, 505 N.W.2d 468 (Ct. App. 1993), a case dealing with the related offense of medical assistance fraud:

> If the false statements did not affect the amount of benefits or payments made, an issue of materiality is raised. If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the

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opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements.

2. Section 946.93(1).

3. The recreation of former § 49.95 as § 946.93 substituted "intentionally" for "willfully," clarifying the mental element required. When used in the Criminal Code, "intentionally" requires that the actor have the purpose to cause the result specified and "have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Section 939.23(3). As applied to this offense, that requires that the defendant knew the statement or representation in the application was false.

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1851 PUBLIC ASSISTANCE FRAUD: CONCEALING OR FAILING TO DISCLOSE AN EVENT AFFECTING ELIGIBILITY— § 946.93(3)(a)

Statutory Definition of the Crime

Public assistance fraud, as defined in § 946.93(3)(a) of the Wisconsin Statutes, is committed by a person who, having knowledge of an event affecting the initial or continued eligibility for public assistance, conceals or fails to disclose that event with an intent to fraudulently secure public assistance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had knowledge of an event affecting the initial or continued eligibility for public assistance.

   The event alleged to have occurred in this case is: (specify the alleged event).

   "Public assistance" means any aid, benefit, or services provided under Chapter 49 of the Wisconsin Statutes.[1]

2. The defendant (concealed) (failed to disclose) that event.

3. The defendant (concealed) (failed to disclose) that event with an intent to fraudulently secure public assistance.

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This requires that the defendant acted with the purpose to obtain public assistance to which (he) (she) was not entitled.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

If you find the defendant guilty, you must also determine beyond a reasonable doubt the value of the public assistance for which the defendant was not eligible and insert that amount in the verdict.[2]

COMMENT

Wis JI-Criminal 1851 was approved by the Committee in February 2015.

This instruction is for criminal violations of § 946.93(3)(a), as created by 2013 Wisconsin Act 226 [effective date: April 10, 2014]. Offenses now defined in § 946.93 were formerly found in § 49.95; there does not appear to be an equivalent of sub. (3)(a) in former § 49.95.

This instruction is for criminal violations of § 946.93(3), which involve payments or benefits of more than $300. There are five ranges of criminal penalties, depending on the value of the payments or benefits. This is addressed by adding a special question at the end of the instruction. See footnote 2, below.

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1. Section 946.93(1).

2. The penalties for violations of § 946.93(3) depend on the value of the payment or benefit. The jury should be asked to determine that value. (See, by analogy, Wis JI-Criminal 1441 Theft, footnote 8.) The applicable penalty is capped by the crime charged in the complaint or information. The penalties are specified in sub. (3)(e) as follows:

Value of payment or benefit	Penalty
less than $300	Class B forfeiture
more than $300 but does not exceed $1000	Class B misdemeanor
more than $1000 but does not exceed $2000	Class A misdemeanor
more than $2000 but does not exceed $5000	Class I felony
more than $5000 but does not exceed $10,000	Class H felony
more than $10,000	Class G felony

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1852 PUBLIC ASSISTANCE FRAUD: FAILURE TO REPORT RECEIPT OF INCOME OR ASSETS — § 946.93(3)(b)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1852 was originally published in 1980 and revised in 1988, 1995, and 2003. It was withdrawn by the Committee in December 2014.

Wis JI-Criminal 1852 addressed violations of former § 49.95(6). 2013 Wisconsin Act 226 [effective date: April 10, 2014] repealed § 49.95 and replaced it with § 946.93. The offense definition in current § 946.93(3)(b) is the rough equivalent of the one provided in former § 49.95(6) — it addresses the failure to report receipt of income or assets.

The Committee decided to withdraw Wis JI-Criminal 1852 because the conduct it addressed now appears to be covered by § 946.93(3)(a), a section created by 2013 Wisconsin Act 226 and for which there was no substantial equivalent under prior law. Section 946.93(3)(a) prohibits concealing or failing to disclose "an event affecting the initial or continued eligibility for public assistance" with an intent to fraudulently secure public assistance. The Committee concluded that sub. (3)(a)'s reference to "an event affecting initial or continued eligibility for public assistance" is broad enough to include the receipt of income or assets and that therefore Wis JI-Criminal 1852 could be withdrawn. See Wis JI-Criminal 1851 for violations of § 946.93(3)(a).

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1854 PUBLIC ASSISTANCE FRAUD: FAILURE TO NOTIFY AUTHORITIES OF CHANGE OF FACTS — § 946.93(3)(c)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 1854 was originally published in 1980 and revised in 1988, 1995, and 2003. It was withdrawn by the Committee in December 2014.

Wis JI-Criminal 1854 addressed violations of former § 49.95(9). 2013 Wisconsin Act 226 [effective date: April 10, 2014] repealed § 49.95 and replaced it with § 946.93. The offense definition in current § 946.93(3)(c) is the rough equivalent of the one provided in former § 49.95(9) — it addresses the failure to notify the public assistance agency "of any change in circumstances for which notification by the recipient must be provided under law."

The Committee decided to withdraw Wis JI-Criminal 1854 because the conduct it addressed now appears to be covered by § 946.93(3)(a), a section created by 2013 Wisconsin Act 226 and for which there was no substantial equivalent under prior law. Section 946.93(3)(a) prohibits concealing or failing to disclose "an event affecting the initial or continued eligibility for public assistance" with an intent to fraudulently secure public assistance. The Committee concluded that sub. (3)(a)'s reference to "an event affecting initial or continued eligibility for public assistance" is broad enough to include the failure to notify "of any change in circumstances" and that therefore Wis JI-Criminal 1854 could be withdrawn. See Wis JI-Criminal 1851 for violations of § 946.93(3)(a).

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1862 FOOD STAMP FRAUD: MISSTATING FACTS ON AN APPLICATION — § 946.92(2)(a)

Statutory Definition of the Crime

Food stamp fraud, as defined in § 946.92(2)(a) of the Wisconsin Statutes, is committed by a person who misstates or conceals facts in a food stamp program application or report of income, assets, or household circumstances with the intent to secure or continue to receive food stamp program benefits.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (misstated) (concealed) facts in a food stamp program [application] [report of income, assets, or household circumstances].

   The facts claimed to have been (misstated) (concealed) in this case are: (specify the alleged facts) .

2. The defendant (misstated) (concealed) facts with the intent to [secure] [continue to receive] food stamp program benefits.

   "With intent to"[1] requires that the defendant had the mental purpose to obtain food stamp program benefits by (misstating) (concealing) facts in the application.

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH FRAUDULENTLY SECURING MORE THAN $100 AND THE EVIDENCE WOULD SUPPORT THAT FINDING[2]

If you find the defendant guilty, you must also determine beyond a reasonable doubt the value of the food stamp program benefits for which the defendant was not eligible and insert that amount in the verdict.

COMMENT

Wis JI-Criminal 1862 was originally published in 1988 and revised in 1995, 2003, and 2007. This revision was approved by the Committee in December 2014; it reflects the renumbering of § 49.795 as § 946.92.

This instruction is for violations of subsection (2) of § 946.92, Food Stamp Offenses. The statute prohibits two different kinds of conduct: misstating or concealing facts in an application with intent to secure food stamp program benefits; and, misstating or concealing facts in a report of income, assets, or household circumstances with intent to continue to receive benefits.

This offense was previously defined in § 49.127; that statute was renumbered § 49.795 by 2001 Wisconsin Act 16. That statute was renumbered 946.92 by 2013 Wisconsin Act 226, effective date: April 10, 2014. The offense definition in current § 946.92(2)(a) is the same as that formerly found in § 49.795(2).

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There are three ranges of criminal penalties, depending on the value of the benefits obtained. This is addressed by adding a special question at the end of the instruction. See footnote 2, below.

1. "With intent to" requires either the mental purpose to cause the result specified or being aware that conduct is practically certain to cause the result. See § 939.22(24) and Wis JI-Criminal 923B. The Committee concluded that the "mental purpose" alternative is most likely to apply to this offense.

2. The penalties for violations of § 946.92(2)(a) are determined by reference to "the value of the food stamp program benefits." The jury should be asked to determine that value. (See, by analogy, Wis JI-Criminal 1441 Theft, footnote 8.) The applicable penalty is capped by the crime charged in the complaint or information.

The penalties for this offense are specified in § 946.92(3)(a) as follows:

Value of benefits secured	Penalty
less than $100	Class B misdemeanor
more than $100 but less than $5000	Class I felony Class H felony if the defendant has a prior conviction under this section
more than $5000	Class G felony

The Committee concluded that if the securing of less than $100 is charged, the jury need not make a finding as to value.

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1870 MEDICAL ASSISTANCE FRAUD: MAKING A FALSE STATEMENT IN AN APPLICATION FOR A BENEFIT OR PAYMENT — § 946.91(2)(a)

Statutory Definition of the Crime

Medical assistance fraud, as defined in § 946.91(2)(a) of the Wisconsin Statutes, is committed by a person who intentionally makes or causes to be made any false statement or representation of a material fact in any application for any medical assistance payment or benefit.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally made or caused to be made a (statement) (representation) of a material fact in an application for (payment) (a benefit) in connection with a medical assistance program.

   The (statement) (representation) claimed to have been made is that: (specify the alleged statement or representation).

   A material fact is one that affects eligibility for or the amount of a (payment) (benefit).[2]

   "Medical assistance program" means a program providing services and items relating to health care to persons who apply for that assistance.[3]

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2. The (statement) (representation) was false when made.

3. The defendant knew that the (statement) (representation) was false.[4]

4. The application for (payment) (benefit) was submitted.

The defendant does not have to receive the (payment) (benefit) sought. All that is required is that the application be submitted for payment.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1870 was originally published in 1992 and revised in 1993 and 2003. This revision was approved by the Committee in October 2014; it reflects the renumbering of § 49.795 as § 946.92.

The offense was formerly defined in § 49.49; that statute was renumbered § 946.91 by 2013 Wisconsin Act 226 [effective date: April 10, 2014]. The offense definition in § 946.91(2)(a) is the rough equivalent of the one provided in former § 49.49(a) ¶1.

1. This instruction is for violations of § 946.91(2)(a), which can be committed either by the person who provides services as part of the medical assistance program or by the person who receives the services. The provider of services may commit the offense by submitting a fraudulent "application for payment." The recipient may commit the offense by submitting fraudulent "application for benefits." The offense is a Class H felony with a maximum fine of $25,000.

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2. This definition of "material" is consistent with the discussion of the term in State v. Williams, 179 Wis.2d 80, 505 N.W.2d 468 (Ct. App. 1993):

> If the false statements did not affect the amount of benefits or payments made, an issue of materiality is raised. If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements.

179 Wis.2d 80, 87-88.

3. The definition of "medical assistance program" was devised by the Committee. "Medical assistance" is defined in § 946.91(1)(b) as: "the program providing aid under subch. IV of Ch. 49, except ss. 49.468 and 49.471." The statutes referred to in the definition are extremely long and complex and do not lend themselves to convenient use as a definition of the term "medical assistance."

4. The recodification of former § 49.49 as § 946.91 substituted "intentionally" for "willfully," clarifying the mental element required. When used in the Criminal Code, "intentionally" requires that the actor have the purpose to cause the result specified and "have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally.'" Section 939.23(3). As applied to this offense, that requires that the defendant knew the statement or representation in the application was false.

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1881 RACKETEERING ACTIVITY — USING PROCEEDS OF A PATTERN OF RACKETEERING ACTIVITY TO ESTABLISH OR OPERATE AN ENTERPRISE — § 946.83(1)

Statutory Definition of the Crime

Engaging in racketeering activity, as defined by § 946.83(1) of the Criminal Code of Wisconsin, is committed by one who has received any proceeds with knowledge that they were derived, directly or indirectly, from a pattern of racketeering activity and uses or invests them directly or indirectly, to establish or operate an enterprise.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant received proceeds that were derived from a pattern of racketeering activity.

   "Pattern of racketeering activity" means that at least three interrelated felonies occurred within a seven-year period and that these felonies amounted to, or posed a threat of, continued criminal activity.[2]

   Felonies are "interrelated" if they have the same or similar intents, results, accomplices, victims or methods of commission, or share other distinguishing characteristics.[3]

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Felonies amount to or show a threat of continued criminal activity if they have been or will be a part of a regular way of doing business.[4]

In this case, it is alleged that the proceeds were derived, directly or indirectly, from the following felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)). Each of the felonies will be defined at the end of this instruction.

2. The defendant knew that the proceeds were derived from a pattern of racketeering activity.

3. The defendant used any of the proceeds to (establish) (operate) (name of alleged enterprise).[5]

4. (Name of alleged enterprise) was an enterprise.

Meaning of "Enterprise"

"Enterprise" means any [(sole proprietorship) (partnership) (corporation) (business trust) (union) organized under the laws of this state] [(legal entity) (union) not organized under the laws of this state] [association or group of individuals associated in fact although not a legal entity].[6]

In this case, it is alleged that the proceeds were derived, directly or indirectly, from the following felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)).

[DEFINE THE ELEMENTS OF EACH OF THE CRIMES.][7]

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Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed at least three predicate felonies as charged in the information. All 12 jurors must also be satisfied beyond a reasonable doubt that the defendant committed the same three predicate felonies.[8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1881 was originally published in 1990. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a charge under § 946.83(1). Subsections (2) and (3) are addressed by Wis JI-Criminal 1882 and 1883, respectively. These are the primary criminal provisions of the Wisconsin Organized Crime Control Act, which is modeled after the federal Racketeer Influenced and Corrupt Organizations Act. The latter is commonly referred to as "RICO" and is found at 18 U.S.C. §§ 1961-1968. The federal RICO statute has both criminal and civil provisions, as does the Wisconsin counterpart. There has been extensive litigation under the federal statute, some of which is relevant to interpreting the Wisconsin statute. The Wisconsin Court of Appeals has recognized that "the voluminous federal law concerning RICO may be persuasive authority as to the interpretation of" the Wisconsin Act. State v. Judd, 147 Wis.2d 398, 401, 433 N.W.2d 260 (Ct. App. 1988).

1. This instruction addresses one type of violation of subsection (1) of § 946.83(1) — investing the proceeds of racketeering activity in an enterprise. Another type of violation is also prohibited but is not

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addressed by the instruction — using proceeds "in the acquisition of any title to, or any right, interest, or equity in, real property."

2. The requirement of three interrelated felonies in a seven-year period is based on the statutory definition of "pattern of racketeering activity" in § 946.82(3):

> "Pattern of racketeering activity" means engaging in at least three incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity.

The requirement that the felonies amount to or pose a threat of continued criminal activity is based on the decision in H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), where the United States Supreme Court interpreted the "pattern" requirement under the federal RICO statute. The Court held that Congress had a "natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related to and that amounted to, or threatened the likelihood of, continued criminal activity." 492 U.S. 229, 237.

The Court relied on the plain meaning of the word "pattern" to conclude that more than "just a multiplicity of racketeering predicates" is required:

> A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357 (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged."

492 U.S. 229, 238.

The court noted that the text of the statute fails to identify any "forms of relationship or external principles" to be used to determine whether a "pattern" exists. Given the legislative purpose of the RICO statutes, however, the Court concludes that a flexible approach is to be used: ". . . a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates." This relationship between predicates requires that the predicates be related and that they amount to or pose a threat of continued criminal activity. "'It is this factor of continuity plus relationship which combines to produce a pattern.'" 492 U.S. 229, 239, citing S. Rep. No. 91-617 at 158. The Court elaborated on the "continuity" requirement:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept — and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear one to another, are distinct requirements. A party

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alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated. See S.Rep. No. 91-617, at 158.

Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities — preferring to deal with this issue in the context of concrete factual situations presented for decision — we offer some examples of how this element might be satisfied. A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

492 U.S. 229, 241-243.

In justifying its conclusion about the "continuity" requirement, the Court relied on the text of the federal statute which, in defining the pattern requirement, states that a pattern "requires" at least two predicate acts. The Court emphasized the significance of the use of "requires" rather than "means" in concluding that the presence of the two predicate acts is the minimal requirement: "it assumes that there is something to a RICO pattern beyond simply the number of predicate acts involved." 492 U.S. 229, 238. The Wisconsin definition of "pattern," however, does use the word "means" where the federal statute uses "requires." This may offer a basis for interpreting the Wisconsin pattern requirement differently than the United States Supreme Court interpreted the federal definition in Northwestern Bell. But in the absence of direct authority for doing so, the Committee decided that the Northwestern Bell definition should be used as a guide for this instruction.

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The definition of "pattern of racketeering activity" in § 948.82(3) is not unconstitutionally vague. State v. O'Connell, 179 Wis.2d 598, 615, 508 N.W.2d 23 (Ct. App. 1993).

3. This is based on § 946.82(3), see note 2, supra.

4. This is based on H. J., Inc. v. Northwestern Bell, cited in note 2, supra.

5. The instruction is drafted on the assumption that the "enterprise" will be a legitimate or regular business and therefore will have a name that can be used to identify it. If that is not the case, substitute a description of the enterprise for the name.

6. The definition of "enterprise" is taken from the statutory definition found in § 946.82(2). Parentheses are added on the assumption that only the alternatives supported by the evidence will be presented to the jury. In State v. Judd, 147 Wis.2d 398, 433 N.W.2d 260 (Ct. App. 1988), the court of appeals held that a one-man corporation could be an "enterprise," at least for purposes of a charge under subsec. (3) of § 946.83. While the "person" who conducts the pattern of racketeering activity through the enterprise must be separate from the enterprise, that test is met where the "one-man band" has incorporated. The act of incorporation forms the enterprise. Also see, State v. O'Connell, 179 Wis.2d 598, 508 N.W.2d 23 (Ct. App. 1993).

7. The Committee assumes that all the elements of the crimes alleged to be the three interrelated felonies must be proved. There are suggested uniform instructions for most of the felonies listed in § 946.82(4).

8. This addition is based on Richardson v. United States, 526 U.S. 813 (1999). Richardson held that unanimous agreement on the predicate acts was required in prosecutions under a "continuing criminal enterprise" statute which is separate from, but similar to, the RICO statute. Adding it here is by analogy to that situation. The 7th Circuit uniform jury instructions require unanimity under the federal RICO statute. See, http://www.ca7.uscourts.gov/Rules/pjury.pdf.

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1882 RACKETEERING ACTIVITY — ACQUIRING OR MAINTAINING AN INTEREST IN OR CONTROL OF AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY — § 946.83(2)

Statutory Definition of the Crime

Engaging in racketeering activity, as defined by § 946.83(2) of the Criminal Code of Wisconsin, is committed by one who, directly or indirectly, acquires or maintains any interest in or control of any enterprise through a pattern of racketeering activity.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of the alleged enterprise)[2] was an enterprise.

   "Enterprise" means any [(sole proprietorship) (partnership) (corporation) (business trust) (union) organized under the laws of this state] [(legal entity) (union) not organized under the laws of this state] [association or group of individuals associated in fact although not a legal entity].[3]

2. The defendant (acquired) (maintained), directly or indirectly, an interest[4] in (name of the alleged enterprise).

3. The defendant (acquired) (maintained) an interest in (name of the alleged enterprise) through a pattern of racketeering activity.

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"Pattern of racketeering activity" means that at least three interrelated felonies occurred within a seven-year period and that these felonies amounted to, or posed a threat of, continued criminal activity.[5]

Felonies are "interrelated" if they have the same or similar intents, results, accomplices, victims or methods of commission, or share other distinguishing characteristics.[6]

Felonies amount to or show a threat of continued criminal activity if they have been or will be a part of a regular way of doing business.[7]

In this case, it is alleged that the defendant (acquired) (maintained) an interest in an enterprise through the following three felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)) .

[DEFINE THE ELEMENTS OF EACH CRIME.][8]

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed at least three predicate felonies as charged in the information. All 12 jurors must also be satisfied beyond a reasonable doubt that the defendant committed the same three predicate felonies.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1882 was originally published in 1990. This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a charge under § 946.83(2). Subsections (1) and (3) are addressed by Wis JI-Criminal 1881 and 1883, respectively. These are the primary criminal provisions of the Wisconsin Organized Crime Control Act, which is modeled after the federal Racketeer Influenced and Corrupt Organizations Act. See the Comment to Wis JI-Criminal 1881 for discussion of these provisions.

1. This instruction is drafted for one type of violation of subsection (2) of § 946.83 — acquiring an interest in an enterprise through a pattern of racketeering activity. The statute also applies to maintaining an interest and to acquiring or maintaining control of an enterprise. If any of those alternatives are involved, the second element would need to be modified and similar changes made in the concluding paragraphs.

2. The instruction is drafted on the assumption that the "enterprise" will be a legitimate or regular business and therefore will have a name that can be used to identify it. If that is not the case, substitute a description of the enterprise for the name.

3. The definition of "enterprise" is taken from the statutory definition found in § 946.82(2). Parentheses are added on the assumption that only the alternatives supported by the evidence will be presented to the jury. In State v. Judd, 147 Wis.2d 398, 433 N.W.2d 260 (Ct. App. 1988), the court of appeals held that a one-man corporation could be an "enterprise," at least for purposes of a charge under subsec. (3) of § 946.83. While the "person" who conducts the pattern of racketeering activity through the enterprise must be separate from the enterprise, that test is met where the "one-man band" has incorporated. The act of incorporation forms the enterprise. Also see, State v. O'Connell, 179 Wis.2d 598, 508 N.W.2d 23 (Ct. App. 1993).

4. This element would need to be modified if an alternative other than "acquiring an interest" is involved, see note 1, supra.

5. The approach to defining the "pattern" requirement is described in detail in note 2, Wis JI-Criminal 1881.

6. This is based on § 946.82(3), see note 2, Wis JI-Criminal 1881.

7. This is based on the decision in H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), discussed at length in note 2, Wis JI-Criminal 1881.

8. The Committee assumes that all the elements of the crimes alleged to be the three interrelated felonies must be proved. There are suggested uniform instructions for most of the felonies listed in § 946.82(4).

9. This addition is based on Richardson v. United States, 526 U.S. 813 (1999). Richardson held that unanimous agreement on the predicate acts was required in prosecutions under a "continuing criminal enterprise" statute which is separate from, but similar to, the RICO statute. Adding it here is by analogy to that situation. The 7th Circuit uniform jury instructions require unanimity under the federal RICO statute. See, http://www.ca7.uscourts.gov/Rules/pjury.pdf.

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1883 RACKETEERING ACTIVITY — CONDUCTING OR PARTICIPATING IN AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY — § 946.83(3)

Statutory Definition of the Crime

Engaging in racketeering activity, as defined by § 946.83(3) of the Criminal Code of Wisconsin, is committed by one who is employed by or associated with an enterprise and who, directly or indirectly, conducts or participates in the enterprise through a pattern of racketeering activity.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of the alleged enterprise) [1] was an enterprise.

   "Enterprise" means any [(sole proprietorship) (partnership) (corporation) (business trust) (union) organized under the laws of this state] [(legal entity) (union) not organized under the laws of this state] [association or group of individuals associated in fact although not a legal entity].[2]

2. The defendant was (employed by) (associated with)[3] (name of the alleged enterprise).

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3. The defendant, directly or indirectly, (conducted) (participated in) (name of the alleged enterprise) through a pattern of racketeering activity.

"Pattern of racketeering activity" means that at least three interrelated felonies occurred within a seven-year period and that these felonies amounted to, or posed a threat of, continued criminal activity.[4]

Felonies are "interrelated" if they have the same or similar intents, results, accomplices, victims or methods of commission, or share other distinguishing characteristics.[5]

Felonies amount to or show a threat of continued criminal activity if they have been or will be part of a regular way of doing business.[6]

In this case, it is alleged that the defendant (conducted) (participated in) an enterprise through the following three felonies: (name the felonies - at least three - they must be listed in sec. 946.82(4)).

[DEFINE THE ELEMENTS OF EACH CRIME.][7]

Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed at least three predicate felonies as charged in the information. All 12 jurors must also be satisfied beyond a reasonable doubt that the defendant committed the same three predicate felonies.[8]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1883 was originally published in 1990 . This revision was approved by the Committee in October 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a charge under § 946.83(3). Subsections (1) and (2) are addressed by Wis JI-Criminal 1881 and 1882, respectively. These are the primary criminal provisions of the Wisconsin Organized Crime Control Act, which is modeled after the federal Racketeer Influenced and Corrupt Organizations Act. See the Comment to Wis JI-Criminal 1881 for discussion of these provisions.

Violations of § 946.83 do not involve a mental element beyond any that may be required for the underlying predicate offenses. State v. Mueller, 201 Wis.2d 121, 145 (Ct. App. 1996). The court found that the absence of a separate intent element in this instruction "buttressed" that conclusion.

1. The instruction is drafted on the assumption that the "enterprise" will be a legitimate or regular business and therefore will have a name that can be used to identify it. If that is not the case, substitute a description of the enterprise for the name.

2. The definition of "enterprise" is taken from the statutory definition found in § 946.82(2). Parentheses are added on the assumption that only the alternatives supported by the evidence will be presented to the jury. In State v. Judd, 147 Wis.2d 398, 433 N.W.2d 260 (Ct. App. 1988), the court of appeals held that a one-man corporation could be an "enterprise," at least for purposes of a charge under subsec. (3) of § 946.83. While the "person" who conducts the pattern of racketeering activity through the enterprise must be separate from the enterprise, that test is met where the "one-man band" has incorporated. The act of incorporation forms the enterprise. Also see, State v. O'Connell, 179 Wis.2d 598, 508 N.W.2d 23 (Ct. App. 1993).

3. Choose the alternative supported by the evidence.

4. The approach to defining the "pattern" requirement is described in detail in note 2, Wis JI-Criminal 1881.

5. This is based on § 946.82(3), see note 2, Wis JI-Criminal 1881.

6. This is based on the decision in H. J., Inc. v. Northwestern Bell, 492 U.S. 229 (1989), discussed at length in note 2, Wis JI-Criminal 1881.

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7. The Committee assumes that all the elements of the crimes alleged to be the three interrelated felonies must be proved. There are suggested uniform instructions for most of the felonies listed in § 946.82(4).

8. This addition is based on Richardson v. United States, 526 U.S. 813 (1999). Richardson held that unanimous agreement on the predicate acts was required in prosecutions under a "continuing criminal enterprise" statute which is separate from, but similar to, the RICO statute. Adding it here is by analogy to that situation. The 7th Circuit uniform jury instructions require unanimity under the federal RICO statute. See, http://www.ca7.uscourts.gov/Rules/pjury.pdf.

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1900 DISORDERLY CONDUCT — § 947.01

Statutory Definition of the Crime

Disorderly conduct, as defined in § 947.01 of the Criminal Code of Wisconsin, is committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[1]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts or language or both.[2]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[3] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether

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committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.][4]

WHERE THE STATE'S CASE RELIES ON STATEMENTS OR CONDUCT THAT MAY CONSTITUTE A THREAT, THERE MUST BE A TRUE THREAT. ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][5]

The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community.[6] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person.

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Meaning of "Tend to Cause or Provoke a Disturbance"

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance, under the circumstances as they then existed.[7] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WHERE THE STATE'S CASE RELIES IN PART ON EVIDENCE THAT THE DEFENDANT WAS CARRYING A FIREARM OR KNIFE AT THE TIME OF THE ALLEGED OFFENSE, ADD THE FOLLOWING:[8]

[(Loading, carrying, or going armed with a firearm) (carrying or going armed with a knife) does not, by itself, constitute disorderly conduct unless other facts and circumstances indicate a criminal or malicious intent.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1900 was originally published in 1966. Non-substantive revisions and additions to the comment were made in 1989, 1991, 1998, 1999, 2001, 2002, 2004, 2009, 2012, and 2016. The 2012 revision added the bracketed material preceding the "Jury's Decision" paragraph to reflect 2011 Wisconsin Act 35. The 2016 revision moved the definition of "true threat" from a footnote to the text and updated footnote 8

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to reflect a change made by 2015 Wisconsin Act 149. This revision was approved by the Committee in February 2018; it added to the Comment.

The application of disorderly conduct and related statutes often involves claims that the exercise of constitutional rights prevents such application or excuses what would otherwise be a criminal violation. For recent discussions, see the following: City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989) (disorderly conduct ordinance); State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989) (criminal trespass to medical facility statute); Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988) (juvenile loitering ordinance); Milwaukee v. Nelson, 149 Wis.2d 434, 439 N.W.2d 562 (1989) (adult loitering ordinance); State v. Dronso, 90 Wis.2d 110, 279 N.W.2d 710 (Ct. App. 1979) (§ 947.01). Also see Texas v. Johnson, 109 S. Ct. 2533 (1989), dealing with the federal flag desecration statute.

In State v. Breitzman, 2017 WI 100, 378 Wis.2d 431, 904 N.W.2d 93, the defendant was charged with crimes relating to her physical and verbal abuse of her teenage son. One of the charges was disorderly conduct based on abusive and profane language directed at the boy. The defendant claimed on appeal that defense counsel provided ineffective assistance in failing to move to dismiss the disorderly conduct charge on free speech grounds. The Wisconsin Supreme Court concluded that defense counsel did not perform deficiently because "whether profane conduct that tends to provoke a disturbance is protected as free speech is unsettled law." ¶84. Counsel's performance is not deficient in failing to raise a constitutional issue where the law is unsettled. The defendant did not raise a facial or as-applied constitutional challenge to the disorderly conduct statute. The law relating to free speech and disorderly conduct is discussed in ¶¶50-55.

In State v. Olsen, 99 Wis.2d 572, 299 N.W.2d 632 (Ct. App. 1980), the defendants were charged with disorderly conduct as a result of demonstrations against a shipment of spent fuel from a nuclear power plant. The court of appeals held that the trial court acted properly in excluding evidence offered by the defendant to show that his conduct was privileged under the defense of necessity as set forth in § 939.47. The court held that necessity is limited to the pressure of natural physical forces such as "storms, fires and privations" and therefore is not available in the context of a protest against the transportation of spent nuclear fuel. 99 Wis.2d 572, 576.

In State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), the court affirmed the convictions of several civil rights demonstrators on the grounds that the defendants' conduct met the requirements of the disorderly conduct statute as to being disruptive of good order and tending to provoke a disturbance and on the additional grounds that each defendant deliberately and knowingly violated commands of persons in authority. In so ruling, the court held that persons in authority over public buildings must be accorded discretion to regulate conduct therein. In appropriate cases, the jury should be instructed on failure to obey lawful commands of persons in authority as constituting disorderly conduct. See note 4, below.

1. The Committee recommends selecting one of the terms in parentheses where possible, but believes it is proper to instruct on all alternatives that are supported by the evidence.

2. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

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> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].
>
> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

3. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct" which tends to provoke a disturbance means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. This interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.
>
> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
>
> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients, but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

4. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was

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a legitimate need to maintain control at the crash site which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

5. Speech alone in certain contexts can constitute disorderly conduct. State v. A.S., 2001 WI 48, ¶1, 243 Wis.2d 173, 626 N.W.2d 712. Also see, State v. Douglas D., 2001 WI 47, ¶3, 243 Wis.2d 204, 626 N.W.2d 725. Verbal or written statements may constitute "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." A.S., ¶29. Also see Douglas D., ¶32. Speech can be considered "otherwise disorderly" if it is of a type that tends to disrupt good order. A.S., ¶33. If the statements constitute threats, they must be "true threats." Douglas D., ¶32; A.S., ¶22. Both A.S. and Douglas D. applied a definition of "true threat" announced in State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762. Perkins involved a charge under § 940.203, which prohibits threats to a judge. The definition of "true threat," in the instruction is based on the one used in Wis JI-Criminal 1240B, Threat To A Judge.

In Elonis v. United States, 575 U.S. ___ [decided June 1, 2015], the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was not based on constitutional requirements — it was a matter of interpreting a federal statute — so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis.

6. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in) . [EXAMPLE: In this case the defendant has testified that he engaged in the conduct in order to protest the Viet Nam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

7. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase

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"tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

8. Section 947.01 was amended by 2011 Wisconsin Act 35, the "licensed carry" law. Section 947.01 was renumbered § 947.01(1) and a new subsection (2) was created. Subsection (2) was amended by 2015 Wisconsin Act 149 [effective date: February 8, 2016] to add reference to a "knife" and reads:

> (2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading a firearm, or for carrying or going armed with a firearm or a knife, without regard to whether the firearm is loaded or the firearm or knife is concealed or openly carried.

The Committee concluded that the new provision is best addressed by adding a statement for cases where there is evidence that the defendant was carrying a firearm at the time of the alleged disorderly conduct.

The phrase "criminal or malicious intent" is used in new sub. (2) of § 947.01. The Committee concluded that "criminal intent" means "intent to commit a crime." "Malicious" does not have an established meaning in the current Wisconsin Criminal Code [with one exception: see § 940.41(1r), that is not applicable here].

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1901 DISRUPTING A FUNERAL OR MEMORIAL SERVICE — § 947.011(2)(a)1.

Statutory Definition of the Crime

Disrupting a funeral or memorial service, as defined in § 947.011(2)(a)1. of the Criminal Code of Wisconsin, is committed by a person who engages in disorderly conduct (during a funeral or memorial service) (during the 60 minutes immediately preceding the scheduled starting time of a funeral or memorial service) (during the 60 minutes immediately following a funeral or memorial service),[1] within 500 feet of any entrance to a facility being used for the service, and with intent to disrupt the service.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[2]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.
3. The conduct of the defendant occurred (during a funeral or memorial service) (during the 60 minutes immediately preceding the scheduled starting time of a

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funeral or memorial service) (during the 60 minutes immediately following a funeral or memorial service).[3]

4. The conduct of the defendant occurred within 500 feet of any entrance to a facility being used for the service.

5. The defendant engaged in the conduct with intent to disrupt the service.

Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts or language or both.[4]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[5] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.][6]

The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community.[7] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person.

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Meaning of "Tend to Cause or Provoke a Disturbance"

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance, under the circumstances as they then existed.[8] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Deciding About Intent To Disrupt

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1901 was approved by the Committee in June 2006.

This instruction is drafted for violations of §947.011(2)(a)1. Section 947.011 was created by 2005 Wisconsin Act 114; effective date: March 1, 2006.

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Act 114 created six offenses. Subsection (2)(a) defines two offenses: subd. 1. prohibits engaging in disorderly conduct within 500 feet and 60 minutes of a funeral service with intent to disrupt the service. This is the offense addressed by this instruction. Subsection (2)(a)2. prohibits intentionally blocking access to a facility being used for a service; an instruction has not been drafted for this violation. Subsection (2)(b) prohibits impeding vehicles with intent to disrupt a funeral process; see Wis JI-Criminal 1901A. Subsections (2)(c) and (d) define offenses that are the same as subs. (2)(a) and (b), respectively, except that they do not include an intent element. Wis JI-Criminal 1901 or 1901A could be adapted for use for those offenses by deleting the intent elements.

Violations of § 947.011 are Class A misdemeanors except that: "Any person who violates sub. (2)(a) or (b) after having been convicted of a violation of this section is guilty of a Class I felony." See sub. (3). Thus, only second offenses charged under sub. (2)(a) or (b) become felonies if the defendant has a prior conviction under any subsection of §947.011.

1. The Committee recommends selecting the alternative supported by the evidence.

2. Speech alone in certain contexts can constitute disorderly conduct. State v. A.S., 2001 WI 48, ¶1, 243 Wis.2d 173, 626 N.W.2d 712. Also see, State v. Douglas D., 2001 WI 47, ¶3, 243 Wis.2d 204, 626 N.W.2d 725. Verbal or written statements may constitute "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." A.S., ¶29. Also see Douglas D., ¶32. Speech can be considered "otherwise disorderly" if it is of a type that tends to disrupt good order. A.S., ¶33. If the statements constitute threats, they must be "true threats."Douglas D., ¶32; A.S., ¶22. BothA.S. and Douglas D. applied a definition of "true threat" announced in State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762. Perkins involved a charge under § 940.203, which prohibits threats to a judge. Wis JI-Criminal 1240B, Threat To A Judge, offers the following definition of "true threat," based on Perkins:

> A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.

3. The Committee recommends selecting the alternative supported by the evidence.

4. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].
>
> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

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5. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct" which tends to provoke a disturbance means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. Such interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.
>
> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
>
> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients, but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

6. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

7. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

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Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case the defendant has testified that he engaged in the conduct in order to protest the Viet Nam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

8. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

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1901A DISRUPTING A FUNERAL OR MEMORIAL SERVICE: IMPEDING VEHICLES — § 947.011(2)(b)

Statutory Definition of the Crime

Disrupting a funeral or memorial service, as defined in § 947.011(2)(b) of the Criminal Code of Wisconsin, is committed by a person who, with intent to disrupt a funeral procession, impedes vehicles that he or she knows are part of the procession.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant impeded vehicles that he or she knew were part of a funeral procession.
2. The defendant impeded vehicles with intent to disrupt a funeral procession.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1901A was approved by the Committee in June 2006.

This instruction is drafted for violations of § 947.011(2)(b). Section 947.01 was created by 2005 Wisconsin Act 114; effective date: March 1, 2006.

Act 114 created six offenses. Subsection (2)(b) prohibits impeding vehicles with intent to disrupt a funeral process. This is the offense addressed by this instruction. Subsection (2)(a) defines two offenses: subd. 1. prohibits engaging in disorderly conduct within 500 feet and 60 minutes of a funeral service with intent to disrupt the service. See Wis JI-Criminal 1901. Subsection (2)(a)2. prohibits intentionally blocking access to a facility being used for a service; an instruction has not been drafted for this violation. Subsections (2)(c) and (d) define offenses that are the same as subs. (2)(a) and (b), respectively, except that they do not include an intent element. Wis JI-Criminal 1901 or 1901A could be adapted for use for those offenses by deleting the intent elements.

Violations of § 947.011 are Class A misdemeanors except that: "Any person who violates sub. (2)(a) or (b) after having been convicted of a violation of this section is guilty of a Class I felony." See sub. (3). Thus, only second offenses charged under sub. (2)(a) or (b) become felonies if the defendant has a prior conviction under any subsection of § 947.011.

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1902 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(a)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to frighten, intimidate, threaten, abuse or harass, makes a telephone call and threatens to inflict injury or physical harm to any person or the property of any person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant made a telephone call to (name of victim).
2. In making the telephone call to (name of victim), the defendant intended to[1] (frighten) (intimidate) (threaten) (abuse) (harass)[2] (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that his or her conduct was practically certain to cause that result.[3]
3. In the course of that telephone call, the defendant threatened[4] to inflict (physical harm to) (damage to the property of) any person.

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It is not necessary that the person making the threat have the ability to carry out the threat.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1902 was originally published in 1981 and revised in 1992 and 1996. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (1)(a) of the revised statute; the offense was previously defined in § 947.012(1), 1989-90 Wis. Stats. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor.

1. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

2. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute, and its definition of harassment, were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

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"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

4. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, ___ Wis.2d ___, ___ N.W.2d ___ [2006 AP 2206], the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of §940.203, Threat to a judge. Also see, State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

The Committee concluded that a separate definition of "true threat" is not necessary in this instruction, because its substance is covered by the second element, which requires that the defendant "intended to frighten, intimidate, threaten, abuse, or harass" the victim.

The following is the most complete definition of "true threat" offered by the court in State v. Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

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1903 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(b)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(b) of the Criminal Code of Wisconsin, is committed by one who telephones another and uses any obscene, lewd, or profane language[1] with intent to frighten, intimidate, threaten, or abuse or suggests any lewd or lascivious act.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant made a telephone call to _____.
2. In making the telephone call to _____, the defendant [used obscene, lewd, or profane language] [suggested any lewd or lascivious act].
3. The defendant made the telephone call to _____ with intent to[3] (frighten) (intimidate) (threaten) (abuse) any person at the called number.

   "With intent to (frighten) (intimidate) (threaten) (abuse)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) another person or was aware that his or her conduct was practically certain to cause that result.[4]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1903 was originally published in 1987 and revised in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (1)(a) of the revised statute; the offense was previously defined in § 947.012(1), 1989-90 Wis. Stats. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor.

1. The statute also applies to one who "suggests any lewd or lascivious act." That alternative is not included in this instruction.

2. 1991Wisconsin Act 39 revised the statute to eliminate two alternatives from this subsection ("harass" and "offend") and created new § 947.012(2) which punishes that conduct as a Class B forfeiture.

3. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1904 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(c)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(c) of the Criminal Code of Wisconsin, is committed by one who makes a telephone call, whether or not conversation ensues, without disclosing his or her identity and with intent to abuse[1] or threaten any person at the called number.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant made a telephone call.

   This does not require that any conversation took place.

2. In making the telephone call the defendant did not disclose (his) (her) identity.

3. The defendant made the telephone call to with intent to[2] (abuse) (threaten) any person at the called number.

   "With intent to (abuse) (threaten)" means that the defendant acted with the mental purpose to (abuse) (threaten) another person or was aware that his or her conduct was practically certain to cause that result.[3]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1904 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. This instruction was for an offense under subsection (5) of the original statute. The section was renumbered subsec. (1)(c) by 1991 Wisconsin Act 39, effective date August 15, 1991. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor. But see note 1, below.

1. The former statute also prohibited calls made with intent to "harass." The 1991 revision recreated the "harass" version of the offense in subsec. (2)(d) where it is punished as a Class B forfeiture.

2. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1905 UNLAWFUL USE OF TELEPHONE — § 947.012(4)

[INSTRUCTION RENUMBERED — SEE WIS JI-CRIMINAL 1907]

COMMENT

Wis JI-Criminal 1905 was originally published in 1987. It was renumbered Wis JI-Criminal 1907 in 1993.

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1906 UNLAWFUL USE OF TELEPHONE — § 947.012(2)(b)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(2)(b) of the Criminal Code of Wisconsin, is committed by one who causes the telephone of another repeatedly to ring with intent to harass any person at the called number.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant caused the telephone of _____ repeatedly to ring.

   This does not require that any conversation took place.

2. The defendant caused the telephone of _____ repeatedly to ring with intent to harass[1] any person at the called number.

   "With intent to harass" means that the defendant acted with the mental purpose to harass another person or was aware that his or her conduct was practically certain to cause that result.[2]

Jury's Decision

If you are satisfied by evidence which satisfies you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1906 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (2)(b), punished as a Class B forfeiture. The conduct was formerly punished as a Class B misdemeanor under § 947.012(3) 1989-90 Wis. Stats.

1. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute, and its definition of harassment, were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

2. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1907 UNLAWFUL USE OF TELEPHONE — § 947.012(2)(c)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(2)(c) of the Criminal Code of Wisconsin, is committed by one who makes repeated telephone calls, whether or not conversation ensues, with intent solely to harass any person at the called number.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you to a reasonable certainty by evidence that is clear, satisfactory and convincing that the following two elements were present.

Elements of the Offense That Must Be Proved

1. The defendant made repeated telephone calls.

   This does not require that any conversation took place.

2. The defendant made repeated telephone calls with intent solely to harass[1] any person at the called number.

   "With intent solely to harass" means that the defendant acted with the mental purpose to harass another person or was aware that his or her conduct was practically certain to cause that result.[2]

Jury's Decision

If you are satisfied by evidence that is clear, satisfactory and convincing that both elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1907 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (2)(c), punished as a Class B forfeiture. The conduct was formerly punished as a Class B misdemeanor under § 947.012(4) 1989-90 Wis. Stats.

1. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

(b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute, and its definition of harassment, were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

2. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1908 UNLAWFUL USE OF A COMPUTERIZED COMMUNICATION SYSTEM — § 947.0125(2)(a)

Statutory Definition of the Crime

Unlawful use of [an electronic mail] [a computerized communication] system, as defined in § 947.0125(2)(a) of the Criminal Code of Wisconsin, is committed by one who with intent to frighten, intimidate, threaten, abuse or harass another person, sends a message to the person on [an electronic mail] [a computerized communication] system, and threatens to inflict injury or physical harm to any person or the property of any person

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant sent a message[1] to (name of victim) on [an electronic mail] [a computerized communication] system.

2. The defendant sent the message to (name of victim) with intent to[2] (frighten) (intimidate) (threaten) (abuse) (harass)[3] (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that the conduct was practically certain to cause that result.[4]

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3. In the message, the defendant threatened[5] to inflict [physical harm to] [damage to the property of] any person.

It is not necessary that the person making the threat have the ability to carry out the threat.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1908 was originally published in 1996. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.0125, Unlawful Use Of Computerized Communication Systems, was created by 1995 Wisconsin Act 353. Effective date: June 7, 1996. Violations of subsec. (2) are Class B misdemeanors.

1. "Message" is defined as follows in § 947.0125(1): "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, or any transfer of a computer program." The definition also provides that "computer program" is as defined in § 943.70.

2. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

3. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute, and its definition of harassment, were found to be

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constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, ___ Wis.2d ___, ___ N.W.2d ___ [2006 AP 2206], the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of § 940.203, Threat to a judge. Also see, State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

The Committee concluded that a separate definition of "true threat" is not necessary in this instruction, because its substance is covered by the second element, which requires that the defendant "intended to frighten, intimidate, threaten, abuse, or harass" the victim.

The following is the most complete definition of "true threat" offered by the court in State v. Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

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1909 UNLAWFUL USE OF A COMPUTERIZED COMMUNICATION SYSTEM: USE OF OBSCENE LANGUAGE — § 947.0125(2)(c)

Statutory Definition of the Crime

Unlawful use of [an electronic mail] [a computerized communication] system, as defined in § 947.0125(2)(c) of the Criminal Code of Wisconsin, is committed by one who with intent to frighten, intimidate, threaten, or abuse another person, sends a message to the person on [an electronic mail] [a computerized communication] system, and uses any obscene, lewd, or profane language or suggests any lewd or lascivious act.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant sent a message[1] to (name of victim) on [an electronic mail] [a computerized communication] system.

2. The defendant sent the message to (name of victim) with intent to[2] (frighten) (intimidate) (threaten) (abuse) (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that the conduct was practically certain to cause that result.[3]

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3. In sending the message, the defendant used any obscene, lewd, or profane language or suggested any lewd or lascivious act.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1909 was originally published in 1996. This revision was approved by the Committee in February 2008 and involved adoption of a new format.

Section 947.0125, Unlawful Use Of Computerized Communication Systems, was created by 1995 Wisconsin Act 353. Effective date: June 7, 1996. Violations of subsec. (2) are Class B misdemeanors.

1. "Message" is defined as follows in § 947.0125(1): "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, or any transfer of a computer program." The definition also provides that "computer program" is as defined in § 943.70.

2. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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1910 HARASSMENT: SUBJECTING ANOTHER TO PHYSICAL CONTACT — § 947.013(1r) and (1m)(a)

Statutory Definition of the Crime

Harassment, as defined in § 947.013 of the Criminal Code of Wisconsin, is committed by one who is subject to an order under § _____[1] that prohibits or limits contact with another person and who, with intent to harass or intimidate that person, strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts to do the same, and accompanies the conduct with a credible threat that places the person in reasonable fear of death or great bodily harm.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. An order under § _____ prohibited or limited the defendant's contact with (name of victim).
2. The defendant [subjected] [attempted to subject][3] (name of victim) to physical contact.[4]
3. The defendant engaged in the conduct with intent to harass or intimidate (name of victim).

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"With intent to harass or intimidate" means that the defendant acted with the mental purpose to harass or intimidate another person or was aware that (his) (her) conduct was practically certain to harass or intimidate another.[5]

4. The defendant's conduct was accompanied by a credible threat that placed (name of victim) in reasonable fear of death or great bodily harm.

"Credible threat" means a threat made with the intent and apparent ability to carry out the threat.[6]

"Great bodily harm" means serious bodily injury.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE THE PENALTY FACTORS SET FORTH IN SUBS. (1t), (1v), OR (1x) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[8]

If you find the defendant guilty, you must answer the following question(s):

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FOR CHARGES UNDER SUB. (1t)[9]

[Did the defendant have a previous conviction for (identify the crime) ?[10]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (1v)

[Did the defendant intentionally gain access to a record in electronic format that contained personally identifiable information regarding the victim in order the facilitate the crime in this case?][11]

FOR CHARGES UNDER SUB. (1x)

[Did the defendant have a previous conviction for (identify the crime) ?[12]

Did the defendant intentionally gain access to a record in order the facilitate the crime in this case?][13]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes", you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1910 was originally published in 1993 and revised in 1994. This revision was approved by the Committee in December 2002 and involved adoption of a new format.

This instruction is for one type of offense defined in subsec. (1m)(a) of § 947.013 — subjecting another to physical contact. For threats to engage in physical contact, see Wis JI-Criminal 1911.

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Prior to the revision of the statute in 1992, there had been no instruction for violations of § 947.013, Harassment, because violations were Class B forfeitures, not crimes. When the statute was amended in 1992 to punish some offenses as misdemeanors and others as felonies, instructions were drafted. The penalties were revised by 2001 Wisconsin Act 109, effective date: February 1, 2003.

Closely related offenses are covered by other statutes. Section 940.32 prohibits "stalking." See Wis JI-Criminal 1248, 1248A, and 1248B. Violations of restraining orders are already made criminal by §§ 813.12, 813.122, and 813.125. See Wis JI-Criminal 2040, which offers a suggested instruction for the three different restraining order offenses recognized by Wisconsin law. In State v. Sveum, 2002 WI App 105, 254 Wis.2d 868, 648 N.W.2d 496, the court held that violations of restraining orders are not lesser included offenses of charges under § 947.013(1r).

A violation of § 943.017(1r) is a Class A misdemeanor. The facts identified in sub. (1t) increase the penalty to a Class I felony. The facts identified in subs. (1v) and (1x) increase the penalty to a Class H felony. These penalty classifications take effect February 1, 2003.

The facts specified in subs. (1t), (1v), and (1x) must be submitted to the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of harassment under Wis. Stat. § 947.013, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]"

1. Here insert the number of the statute under which the order was entered: § 813.12, § 813.122, or § 813.125. See § 947.013(1r)(b). The validity of the underlying order may not be collaterally attacked in the criminal prosecution for violating the order, absent a showing of fraud in the obtaining of the order. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

2. Identifying the elements of this offense requires combining facts found in several subsections of § 947.013. Subsection (1r) states that it is a Class A misdemeanor if a person "violates subsection (1m) under all the following circumstances":

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

So two of the elements of the offense are those specified above. The other two are provided in subsection (1m). Subsection (1m)(a) refers to: "Strikes, shoves, kicks or otherwise subjects the person to

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physical contact or attempts or threatens to do the same." This was adapted for the second element. The introductory clause of subsection (1m) refers to engaging in conduct "with intent to harass or intimidate another person." This is used as the third element in the instruction.

3. If a case is based on the claim that the defendant attempted to subject the victim to physical contact, definition of "attempt" should be included. See Wis JI-Criminal 580.

4. The full description of the offense used in the statute provides: "strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts . . . to do the same." The instruction uses only "physical contact" because that term includes the other, more specific, alternatives.

5. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary. Also see footnote 3, Wis JI-Criminal 1912.

"Intimidate" is defined as "to make timid or fearful" in Webster's New Collegiate Dictionary.

6. Section 947.013(1)(b). The Wisconsin statutes uses the same definition of "credible threat" that is found in § 646.9 of the California Penal Code, which defines the crime of "stalking."

7. See Wis JI-Criminal 914 for a more complete definition of "great bodily harm."

8. The questions address the penalty-increasing facts set forth is subs. (1t), (1v), and (1x) of § 943.017.

9. The following three questions address the penalty-increasing provision set forth in sub. (1t) of § 943.017: "Whoever violates sub. (1r) is guilty of a Class I felony if the person has a prior conviction under this subsection or (sub. (1r), (1v), or (1x) or s. 940.32 (2), (2e), (2m), or (3) involving the same victim and the present violation occurs within 7 years of the prior conviction."

10. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

11. The factor specified in § 947.013(1v) increases the penalty to that for a Class H felony.

Sub. (1)(c) of § 943.017 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

12. The facts set forth in sub. (1x) increase the penalty to that for a Class H felony.

The applicable crimes are: violations § 947.013(1r), (1t), or (1v); or, violations of § 940.32(2), (2e), (2m), or (3).

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13. Note that this fact is not worded in the same manner as the similar fact in sub. (1v). This statement requires only access to a "record," not a "record in electronic format that contains personally identifiable information regarding the victim."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

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1911 HARASSMENT: THREATENING PHYSICAL CONTACT WITH ANOTHER — § 947.013(1r) and (1m)(a)

Statutory Definition of the Crime

Harassment, as defined in § 947.013 of the Criminal Code of Wisconsin, is committed by one who is subject to an order under § _____[1] that prohibits or limits contact with another person and who, with intent to harass or intimidate that person, makes a credible threat of physical contact that places the person in reasonable fear of death or great bodily harm.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. An order under § _____ prohibited or limited the defendant's contact with (name of victim).

2. The defendant made a credible threat of physical contact[3] that placed (name of victim) in reasonable fear of death or great bodily harm.

   "Credible threat" means a threat made with the intent to carry out the threat and with the apparent ability to do so.[4]

   "Great bodily harm" means serious bodily injury.[5]

3. The defendant made the threat with intent to harass or intimidate (name of victim).

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"With intent to harass or intimidate" means that the defendant acted with the mental purpose to harass or intimidate another person or was aware that (his) (her) conduct was practically certain to harass or intimidate another.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE THE PENALTY FACTORS SET FORTH IN SUBS. (1t), (1v), OR (1x) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[7]

If you find the defendant guilty, you must answer the following question(s):

FOR CHARGES UNDER SUB. (1t)[8]

[Did the defendant have a previous conviction for (identify the crime) ?[9]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

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FOR CHARGES UNDER SUB. (1v)

[Did the defendant intentionally gain access to a record in electronic format that contained personally identifiable information regarding the victim in order the facilitate the crime in this case?][10]

FOR CHARGES UNDER SUB. (1x)

[Did the defendant have a previous conviction for (identify the crime) ?[11]

Did the defendant intentionally gain access to a record in order the facilitate the crime in this case?][12]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 1910.1 in 1993 and republished without change in 1994. This revision was approved by the Committee in December 2002; it renumbered the instruction, adopted a new format and made nonsubstantive changes in the text.

This instruction is for one type of offense defined in subsec. (1m)(a) of § 947.013 — threats to engage in physical contact. For subjecting another to physical contact, see Wis JI-Criminal 1910.

See the Comment to Wis JI-Criminal 1910 for general information about § 947.013.

The facts specified in subs. (1t), (1v), and (1x) must be submitted to the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of harassment under Wis. Stat. § 947.013, at the time and place charged in the information.

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We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]"

1. Here insert the number of the statute under which the order was entered: § 813.12, § 813.122, or § 813.125. See § 947.013(1r)(b). The validity of the underlying order may not be collaterally attacked in the criminal prosecution for violating the order, absent a showing of fraud in the obtaining of the order. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

2. Identifying the elements of this offense requires combining facts found in several subsections of § 947.013. Subsection (1r) states that it is a Class A misdemeanor if a person "violates subsection (1m) under all the following circumstances":

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

So two of the elements of the offense are those specified above. The other two are provided in subsection (1m). Subsection (1m)(a) refers to: "Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same." This was adapted for the second element. The introductory clause of subsection (1m) refers to engaging in conduct "with intent to harass or intimidate another person." This is used as the third element in the instruction.

3. The full description of the offense used in the statute provides: "strikes, shoves, kicks, or otherwise subjects the person to physical contact or attempts or threatens to do the same." The instruction uses only "physical contact" because that term includes the other, more specific, alternatives.

4. This is the definition provided in § 947.013(1)(b). It is modeled after § 646.9 of the California Penal Code.

As described in the comment preceding note 1, supra, the instruction collapses into one element two statements that result from a literal reading of the statute. Subsection (1m)(a) refers to a threat of physical contact; subsection (1r)(a) refers to accompanying a violation of sub. (1m) with a "credible threat." Thus, a literal reading would require a "threat accompanied by a credible threat." The Committee concluded that the statute does not require proof of two separate threats. Rather, reading the subsections together indicates that what is required is a threat made under such circumstances that it is a "credible threat," as defined in § 947.013(1)(b).

5. See Wis JI-Criminal 914 for a more complete definition of "great bodily harm."

6. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

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"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary. Also see footnote 3, Wis JI-Criminal 1912.

"Intimidate" is defined as "to make timid or fearful" in Webster's New Collegiate Dictionary.

7. The questions address the penalty-increasing facts set forth in subs. (1t), (1v), and (1x) of § 943.017.

8. The following three questions address the penalty-increasing provision set forth in sub. (1t) of § 943.017: "Whoever violates sub. (1r) is guilty of a Class I felony if the person has a prior conviction under this subsection or (sub. (1r), (1v), or (1x) or s. 940.32 (2), (2e), (2m), or (3) involving the same victim and the present violation occurs within 7 years of the prior conviction."

9. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

10. The factor specified in § 947.013(1v) increases the penalty to that for a Class H felony.

Sub. (1)(c) of § 943.017 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

11. The facts set forth in sub. (1x) increase the penalty to that for a Class H felony.

The applicable crimes are: violations § 947.013(1r), (1t), or (1v); or, violations of § 940.32(2), (2e), (2m), or (3).

12. Note that this fact is not worded in the same manner as the similar fact in sub. (1v). This statement requires only access to a "record," not a "record in electronic format that contains personally identifiable information regarding the victim."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

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1912 HARASSMENT: ENGAGING IN A COURSE OF CONDUCT WHICH HARASSES OR INTIMIDATES ANOTHER — § 947.013(1r) and (1m)(b)

Statutory Definition of the Crime

Harassment, as defined in § 947.013 of the Criminal Code of Wisconsin, is committed by one who is subject to an order under § _____[1] that prohibits or limits contact with another person and who, with intent to harass or intimidate that person, engages in a course of conduct which harasses or intimidates the person, serves no legitimate purpose, and is accompanied by a credible threat that places the person in reasonable fear of death or great bodily harm.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. An order under § _____ prohibited or limited the defendant's contact with (name of victim).

2. The defendant engaged in a course of conduct which harassed[3] or intimidated[4] (name of victim) and which served no legitimate purpose.

   A course of conduct is a series of acts over a period of time, however short, showing a continuity of purpose.[5]

3. The defendant engaged in the conduct with intent to harass or intimidate (name of victim).

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"With intent to harass or intimidate" means that the defendant acted with the mental purpose to harass or intimidate another person or was aware that (his) (her) conduct was practically certain to harass or intimidate another.[6]

4. The defendant's conduct was accompanied by a credible threat that placed (name of victim) in reasonable fear of death or great bodily harm.

"Credible threat" means a threat made with the intent to carry out the threat and with the apparent ability to do so.[7]

"Great bodily harm" means serious bodily injury.[8]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE THE PENALTY FACTORS SET FORTH IN SUB. (1t) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACTOR IS ESTABLISHED[9]

If you find the defendant guilty, you must answer the following question(s):

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FOR CHARGES UNDER SUB. (1t)[10]

[Did the defendant have a previous conviction for (identify the crime) ?[11]

Was the victim of that crime the victim of the crime in this case?

Did the crime in this case occur within 7 years after the previous conviction?]

FOR CHARGES UNDER SUB. (1v)

[Did the defendant intentionally gain access to a record in electronic format that contained personally identifiable information regarding the victim in order the facilitate the crime in this case?][12]

FOR CHARGES UNDER SUB. (1x)

[Did the defendant have a previous conviction for (identify the crime) ?[13]

Did the defendant intentionally gain access to a record in order the facilitate the crime in this case?][14]

CONTINUE WITH THE FOLLOWING IN ALL CASES

Before you may answer "yes", you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1912 was originally published in 1993 and revised in 1994. This revision was approved by the Committee in December 2002 and involved adoption of a new format.

See the Comment to Wis JI-Criminal 1910 for general information about § 947.013.

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A violation of § 943.017 is a Class A misdemeanor. The facts identified in subs. (1t) increase the penalty to a Class I felony. The facts identified in sub. (1v) and (1x) increase the penalty to a Class H felony. These penalty classifications take effect February 1, 2003.

The facts must be submitted to the jury because they increase the statutorily-authorized penalty range. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of harassment under Wis. Stat. § 947.013, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[State the applicable question.]"

1. Here insert the number of the statute under which the order was entered: § 813.12, § 813.122, or § 813.125. See § 947.013(1r)(b). The validity of the underlying order may not be collaterally attacked in the criminal prosecution for violating the order, absent a showing of fraud in the obtaining of the order. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

2. Identifying the elements of this offense requires combining facts found in several subsections of § 947.013. Subsection (1r) states that it is a Class A misdemeanor if a person violates subsection (1m) under "all the following circumstances":

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

So two of the elements of the offense are those specified above. The other two are provided in subsection (1m). Subsection (1m)(a) states: "Engages in a course of conduct which harasses or intimidates the person and serves no legitimate purpose." This is used in the second element. [An alternative is provided in (1m)(a): "Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same." See Wis JI-Criminal 1910.] The introductory clause of subsection (1m) refers to engaging in conduct "with intent to harass or intimidate another person." This is used as the third element in the instruction.

3. The way "harass" is used in § 947.013(1m)(b) is the same as that used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute was found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407 citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

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4. "Intimidate" is defined as "to make timid or fearful" in Webster's New Collegiate Dictionary.

5. This definition is based on the one provided in § 947.013(1)(a), which reads as follows:

"Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.

6. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

For a discussion of the meaning of "harass" and "intimidate," see notes 3 and 4, Wis JI-Criminal 1912.

7. This definition is based on the one provided in § 947.013(1)(b), which reads as follows:

"Credible threat" means a threat made with the intent and apparent ability to carry out the threat.

8. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a more complete discussion of the definition of "great bodily harm."

9. The questions address the penalty-increasing facts set forth is subs. (1t), (1v), and (1x) of § 943.017.

10. The following three questions address the penalty-increasing provision set forth in sub. (1t) of § 943.017: "Whoever violates sub. (1r) is guilty of a Class I felony if the person has a prior conviction under this subsection or (sub. (1r), (1v), or (1x) or s. 940.32 (2), (2e), (2m), or (3) involving the same victim and the present violation occurs within 7 years of the prior conviction."

11. The applicable crimes are: a violent crime as defined in § 939.632(1)(e)1.; stalking under § 940.32; or, harassment under § 947.013(1r), (1t), (1v), or (1x).

12. The factor specified in § 947.013(1v) increases the penalty to that for a Class H felony.

Sub. (1)(c) of § 943.017 provides: "'Personally identifiable information' has the meaning given in s. 19.62(5)."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

13. The facts set forth in sub. (1x) increase the penalty to that for a Class H felony.

The applicable crimes are: violations § 947.013(1r), (1t), or (1v); or, violations of § 940.32(2), (2e), (2m), or (3).

14. Note that this fact is not worded in the same manner as the similar fact in sub. (1v). This statement requires only access to a "record," not a "record in electronic format that contains personally identifiable information regarding the victim."

Sub. (1)(d) of § 943.017 provides: "'Record' has the meaning given in s. 19.32(2)."

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1920 BOMB SCARES — § 947.015

Statutory Definition of the Crime

Bomb scare, as defined in section 947.015 of the Criminal Code of Wisconsin, is committed by one who intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by means of explosives.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (conveyed) (caused to be conveyed) (a threat) (information) concerning an attempt or alleged attempt (being made) (to be made) to destroy any property by means of explosives.

   "Intentionally" means that the defendant must have had the mental purpose to convey or cause to be conveyed (a threat) (information) concerning an attempt or alleged attempt (being made) (to be made) to destroy property by means of explosives.[1]

   FOR CASES INVOLVING A THREAT ADD THE FOLLOWING.[2]

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[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in making this determination.]

2. The (threat) (information) was false.[3]

3. The defendant knew that the (threat) (information) was false. This requires only that the defendant believed that the (threat) (information) was false.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1920 was originally published as Wis JI-Criminal 1905 in 1971. It was renumbered and republished without change in 1987 and revised in April 1993. This revision was approved by the Committee in February 2008 and involved adoption of a new format and adding a definition of threat to the text.

In State v. Van Ark, 62 Wis.2d 155, 215 N.W.2d 41 (1974), the Wisconsin Supreme Court held that a violation of § 947.015 was not a lesser included offense of what was then endangering safety by conduct regardless of life. The current counterpart to that offense is Recklessly Endangering Safety under § 941.30.

1. "Intentionally" means that the actor has the mental purpose to cause the result specified or "is aware that his or her conduct is practically certain to cause that result." § 939.23(3) The "mental purpose" alternative is most likely to apply to this offense. For discussion of the "practically certain" alternative, see Wis JI-Criminal 923B.

2. In State v. Robert T., 2008 WI App 22, ___ Wis.2d ___, ___ N.W.2d ___ [2006 AP 2206], the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. The definition of "threat" in the instruction is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. State v. Robert T. cited Perkins with approval. The Committee concluded that the term "true threat" is a constitutional term of art that need not be communicated to the jury in a situation like the one covered by this instruction where it could be especially confusing given the requirement that the threat be false.

Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

3. Although the statute does not specify that the threat be "false," the Committee is satisfied this is implied by the next clause referring to the actor to "knowing such to be false."

This conclusion is bolstered by the decision in State v. Van Ark, supra. In concluding that a violation of § 947.015 was not a lesser included offense of what was then called endangering safety by conduct regardless of life, the court identified the elements of § 947.015 as follows:

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> It is apparent from a comparison of the two statutes that sec. 947.015, Stats., is not an included crime in sec. 941.30 because it does require proof of additional facts, namely, the conveyance of a false bomb threat and knowledge that it is false. The state would be required to prove under sec. 941.30 that the "bomb" was imminently dangerous and under sec. 947.015 that the "bomb" was false or inoperable.

62 Wis.2d 155, 164

4. Section 939.23(3) provides that when the word "intentionally" is used in a criminal statute, it requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally.'"

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1925A INTENTIONAL TERRORIST THREATS — § 947.019(1)(a) - (d)

Statutory Definition of the Crime

Terrorist threats, as defined in § 947.019 of the Criminal Code of Wisconsin, is committed by any person who threatens to cause the death of or bodily harm to any person or to damage any person's property and who intends to (prevent the occupation of or cause the evacuation of a building)[1] (cause public inconvenience) (cause public panic or fear) (cause an interruption or impairment of governmental operations).[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause the death of or bodily harm to any person or to damage any person's property.

   A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the

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ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.[3]

2. The defendant intended to (prevent the occupation of or cause the evacuation of a building) (cause public inconvenience) (cause public panic or fear) (cause an interruption or impairment of governmental operations).

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1925A was approved by the Committee in December 2016.

This instruction is drafted for violations of sec. 947.019(1)(a) - (d), created by 2015 Wisconsin Act 311 [effective date: April 1, 2016]. Each subsection requires intent to cause the specified result. Violations of sub. (1)(e), which involve recklessness instead of intent, are addressed by Wis JI-Criminal 1925B.

The offense is a Class I felony unless the violation "contributes to any individual's death," in which case the penalty increases to a Class G felony. Sec. 947.019(2).

1. In addition to applying to a "building," the statute also applies to "dwelling, school premises, vehicle, facility of public transportation, or place of public assembly or any room within a building, dwelling, or school." The instruction is drafted for "building" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

2. The statute also applies to causing an interruption or impairment of "public communication, of transportation, or of a supply of water, gas, or other public service." The instruction is drafted for impairment of "governmental operations" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

3. Other Wisconsin statutes prohibiting a "threat" have been interpreted to require a "true threat." The definition of "true threat" is based on the one used for the other criminal offenses involving threats and is derived from State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. For a complete explanation of the definition see footnote 3, Wis JI-Criminal 1240B Threat To A Judge.

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1925B RECKLESS TERRORIST THREATS — § 947.019(1)(e)

Statutory Definition of the Crime

Terrorist threats, as defined in § 947.019 of the Criminal Code of Wisconsin, is committed by any person who threatens to cause the death of or bodily harm to any person or to damage any person's property and creates an unreasonable and substantial risk of (preventing the occupation of or causing the evacuation of a building)[1] (causing public inconvenience) (causing public panic or fear) (causing an interruption or impairment of governmental operations)[2] and is aware of that risk.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause the death of or bodily harm to any person or to damage any person's property.

   A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. "True threat" means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the

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ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.[3]

2. The defendant created an unreasonable and substantial risk of (preventing the occupation of or causing the evacuation of a building) (causing public inconvenience) (causing public panic or fear) (causing an interruption or impairment of governmental operations).

3. The defendant was aware of that risk.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1925B was approved by the Committee in December 2016.

This instruction is drafted for violations of sec. 947.019(1)(e), created by 2015 Wisconsin Act 311 [effective date: April 1, 2016]. Subsection (1)(e) requires creating "an unreasonable and substantial risk" that one of the specified harms will occur and being "aware of that risk," a standard equivalent to criminal recklessness under § 939.25. Violations of sub. (1)(a) - (d), which involve intent instead of recklessness, are addressed by Wis JI-Criminal 1925A.

The offense is a Class I felony unless the violation "contributes to any individual's death," in which case the penalty increases to a Class G felony. Sec. 947.019(2).

1. In addition to applying to a "building," the statute also applies to "dwelling, school premises, vehicle, facility of public transportation, or place of public assembly or any room within a building, dwelling, or school." The instruction is drafted for "building" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

2. The statute also applies to causing an interruption or impairment of "public communication, of transportation, or of a supply of water, gas, or other public service." The instruction is drafted for

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impairment of "governmental operations" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

3. Other Wisconsin statutes prohibiting a "threat" have been interpreted to require a "true threat." The definition of "true threat" is based on the one used for the other criminal offenses involving threats and is derived from State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. For a complete explanation of the definition see footnote 3, Wis JI-Criminal 1240B Threat To A Judge.

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1930 FAILURE TO WITHDRAW FROM AN UNLAWFUL ASSEMBLY — § 947.06(3)

Statutory Definition of the Crime

Section 947.06(3) of the Criminal Code of Wisconsin is violated by any person who intentionally fails or refuses to withdraw from an unlawful assembly which the person knows has been ordered to disperse.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. An unlawful assembly existed.

CHOOSE THE ALTERNATIVE SUPPORTED BY THE EVIDENCE.[1]

[An assembly consists of three or more persons. An assembly is unlawful when it causes a disturbance of public order such that it is reasonable to believe[2] that the assembly will cause injury to persons or damage to property unless it is immediately dispersed.][3]

[An assembly consists of three or more[4] persons. An assembly is unlawful when those persons assemble for the purpose of blocking or obstructing the lawful use by any other person of any property and the assembly does in fact block or obstruct the lawful use of such property.][5]

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2. The defendant was part of that assembly.[6]

3. The assembly was ordered to disperse by a police officer.[7]

4. The defendant knew that the assembly had been ordered to disperse.[8]

5. The defendant intentionally failed or refused to withdraw from the unlawful assembly.[9]

"Intentionally" means that the defendant must have had the mental purpose to fail or refuse to withdraw.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1930 was originally published in 1992. This revision was approved by the Committee in February 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This offense was described as follows in the 1953 Legislative Council Report on the Criminal Code:

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> Making assemblies which are likely to result in disorder unlawful is essentially a crime prevention device. An unlawful assembly is basically an assembly which is so dominated by mob psychology that its members are very likely to do acts of violence which as individuals they would not do. One type of unlawful assembly is bent on doing some particular unlawful act. The lynch mob is an example. Another type is best illustrated by the college homecoming riot type of situation. There, the assembly is not bent on any particular unlawful act, but in the process of "letting off steam," the loss of a sense of individual responsibility which results from large numbers acting together is apt to culminate in injury to person or property. The crux of the matter is that most of the people in an unlawful assembly are peaceful citizens who would never commit a violent crime if it were not for the fact that mob psychology dominates their thinking. Therefore, it follows that if the assembly can be dispersed and mob spirit dissipated before violence results, a real step toward preventing crime has been taken.

(Report, p. 215)

The constitutionality of § 947.06 was upheld by a three-judge district court panel in Cassidy v. Ceci, 320 F. Supp. 223 (E.D. Wis. 1970). The court held that the statute is not "vague or indefinite, but fairly apprises those required to comply with what 'it commands or forbids.' Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)." 320 F. Supp. 223, 226. The court also rejected the claim that the statute delegated too much discretion to police: ". . . the enactment with reasonable clarity delimits the officers' discretion in that it authorizes an arrest only where 'it is reasonable to believe' that the disturbance will cause injury. This is akin to the 'probable cause' standard. . . ." 320 F. Supp. 223, 226.

The court also held that the statute does not apply where the disturbance or damage is caused by hostile onlookers, not by the participants in the assembly: ". . . this statute adequately evidences a design to penalize the members of assemblies only when it is their own conduct which causes a disturbance or damage, as distinguished from a disturbance or damage that is caused by militant onlookers." 320 F. Supp. 223, 226. The court cited legislative history for the current version of the statute, indicating that the legislature intended to restate the rule found in Shields v. State, 187 Wis. 448, 204 N.W. 486 (1925).

The Shields decision affirmed the conviction of a man who assaulted a participant in a Ku Klux Klan parade in Boscobel in 1924. In reviewing the case, the court found it "appropriate to consider the legal status of the parade. . . ." The court found that as long as the people in the parade were conducting themselves peacefully, they were not engaged in an unlawful assembly, defined as assembling in such a manner "that the persons so assembled will disturb the peace tumultuously." The fact that the beliefs and tenets of those in the assembly might be expected to "excite resentment" in observers does not make the assembly unlawful. Thus, the defendant had no right to interfere with the parade and his conviction for assault was allowed to stand.

1. The two definitions of "unlawful assembly" deal with different kinds of conduct. The first involves an assembly that creates a risk of injury or damage. The second involves obstruction of the lawful use of property.

2. "Reasonable to believe" has been likened to the standard of probable cause. See Cassidy v. Ceci, 330 F. Supp. 223 (E.D. Wis. 1970).

3. This is adapted from the last sentence of § 947.06(1). Note that there are three parts to this definition of an unlawful assembly: (1) it must consist of three or more persons; (2) it must be causing a

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disturbance of public order; and (3) it must be reasonable to believe that the assembly will cause personal injury or property damage unless it is immediately dispersed.

4. Including the requirement that there be three or more persons in this second definition is based on the reference in § 947.06(2) that an unlawful assembly "includes" an assembly as described in that subsection. The Committee interpreted this as a reference to incorporating the "three or more" requirement from the definition of unlawful assembly in subsection (1). While common law definitions of unlawful assembly vary, it was common that they required three or more persons. 1953 Report on the Criminal Code, p. 217. Also see Black's Law Dictionary (7th Edition), referring to unlawful assembly at common law as the meeting together of three or more persons.

5. This is adapted from the alternative definition of "unlawful assembly" provided in § 947.06(2).

6. This element is implicit in the definition of the crime, which penalizes refusal to withdraw from an unlawful assembly.

7. Section 947.06(1) provides that an order to disperse may be given by "sheriffs, their undersheriffs, and deputies, constables, marshals, and police officers." If other than a police officer is involved, the proper title should be substituted.

8. The definition of the crime refers to an assembly "which the person knows has been ordered to disperse." § 947.06(3). The knowledge requirement also results from the use of "intentionally" at the beginning of that section. See § 939.23(3).

9. The essence of this offense is the refusal to disperse when ordered to do so.

> While no crime has been committed under this section until there has been a refusal to comply with a lawful order to disperse, this section does not confer immunity on persons who commit some other crime while members of an unlawful assembly. Individual members of the assembly may be guilty of disorderly conduct, of conspiracies or attempts, or even of criminal damage to property or of homicide if the assembly has progressed to that stage. In this section, however, the emphasis is on the preventive police measures and obstruction to those measures.

1953 Report on the Criminal Code p. 216.

10. The Committee concluded that the"mental purpose" definition of intent is most likely to apply in the context of this offense. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

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1960 CONTRIBUTING TO DELINQUENCY OR NEGLECT OF CHILDREN — § 947.15(1)(a)

1961 CONTRIBUTING TO DELINQUENCY OF CHILDREN BY PARENT, GUARDIAN, OR LEGAL CUSTODIAN — § 947.15(1)(b)

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 1960 was originally published in 1967 and was revised in 1980.

Wis JI-Criminal 1961 was originally published in 1981.

Both instructions were withdrawn in 1989 because the statute with which they deal was repealed by 1987 Wisconsin Act 332, effective July 1, 1989. The conduct covered by the repealed statutes is prohibited by two new statutes. See § 948.21, Neglecting A Child (Wis JI-Criminal 2150) and § 948.40, Contributing To The Delinquency Of A Child (Wis JI-Criminal 2170, 2170A, and 2171).

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1980 MISTREATING AN ANIMAL — §§ 951.02 and 951.18(1)

Statutory Definition of the Crime

Mistreating an animal, as defined in §§ 951.02 and 951.18 of the Criminal Code of Wisconsin, is committed by one who (intentionally) (negligently)[1] treats any animal in a cruel manner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant treated an animal[2] in a cruel manner.

   "Cruel" means causing (unnecessary and excessive pain or suffering) (unjustifiable injury or death).[3]

2. The defendant (intentionally) (negligently) treated an animal in a cruel manner.

   ["Intentionally" requires that the defendant acted with the mental purpose to treat the animal in a cruel manner or was aware that the conduct was practically certain to cause that result.][4]

   ["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[5] "Criminal negligence" means:

   - the conduct created a risk of death or great bodily harm; and
   - the risk of death or great bodily harm was unreasonable and substantial; and

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- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED[6]

If you find the defendant intentionally treated an animal in a cruel manner, you must answer the following question:

["Did treating the animal in a cruel manner result in the (mutilation) (disfigurement) (death) of the animal?"][7]

["Did the defendant cause injury to the animal and know that the animal was used by a law enforcement agency to perform agency functions or duties?"][8]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the answer to the question is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 1980 was originally published in 1984 and revised in 1986, 1989, 1995, and 2005. The 2005 revision adopted a new format and changed the definition of "negligently." The 2012 revision updated the Comment and footnote 2. This revision was approved by the Committee in December 2012; it added to the text for felony offenses and added to footnote 4.

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1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

2011 Wisconsin Act 32 made changes in Chapter 951 relating to its application to scientific research. § 951.02 Mistreating Animals was amended to read as follows:

> No person may treat any animal, whether belonging to the person or another, in a cruel manner. This section does not prohibit ~~bona fide experiments carried on for scientific research or~~ normal and accepted veterinary practices.

And, § 951.015(3) was created to provide that the chapter does not apply to research pursuant to a procedure approved by an educational or research institution.

Simple violations of the statutes relating to cruelty to animals are Class C forfeitures. When a person "intentionally or negligently violates" the statutes, the offense is a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in two circumstances: "Any person who intentionally violates s. 951.02, resulting in the mutilation, disfigurement, or death of an animal, is guilty of a Class I felony"; and, "Any person who intentionally violates § 951.02 or 951.06, knowing that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties and causing injury to the animal, is guilty of a Class I felony."

If the felony offense is charged, the Committee suggests adding a special question to address the penalty-increasing fact.

Chapter 951 applies to individuals who used snowmobiles to run down and kill deer. Criminal charges are not superceded by regulations relating to hunting in Chapter 29, Wisconsin Statutes. State v. Kuenzi, 2011 WI App 30, ¶3, 332 Wis.2d 299, 796 N.W.2d 222.

1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see Comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:
(a) Warm-blooded creature, except a human being;
(b) Reptile; or
(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so-called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

The definition of "animal" includes non-captive wild animals, such as deer. State v. Kuenzi, 2011 WI App 30, ¶17, 332 Wis.2d 299, 796 N.W.2d 222.

3. This definition is provided in § 951.01(2).

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4. See § 939.23(3) and Wis JI-Criminal 923A and 923B. A charge of intentionally mistreating an animal, resulting in death, under §§ 951.02 and 951.18(1) requires proof of intent to treat the animal in a cruel manner; the state does not have to prove the defendant intended to cause the animal's death. State v. Klingelhoets, 2012 WI App 55, 341 Wis.2d 432, 814 N.W.2d 885.

5. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term "negligent" or "negligently." This offense is defined in §§ 951.02 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI-Criminal 925.

6. Intentionally treating an animal in a cruel manner becomes a Class I felony in two situations. See footnotes 7 and 8, below. The Committee recommends that the penalty increasing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict; one of the bracketed questions should be included:

We, the jury, find the defendant guilty of mistreating an animal, under Wis. Stat. § 951.02, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

["Did treating the animal in a cruel manner result in the (mutilation) (disfigurement) (death) of the animal?"]

["Did the defendant cause injury to the animal and know that the animal was used by a law enforcement agency to perform agency functions or duties?"]

7. Section 951.18(1) provides: "Any person who intentionally violates s. 951.02, resulting the mutilation, disfigurement or death of an animal, is guilty of a Class I felony."

8. Section 951.18(1) provides: "Any person who intentionally violates s. 951.02 or 951.06, knowing that the animal that is the victim is used by a law enforcement agency to perform agency functions or duties and causing injury to the animal, is guilty of a Class I felony."

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1981 HARASSMENT OF POLICE OR FIRE ANIMALS — §§ 951.095 and 951.18(2m)

Statutory Definition of the Crime

Sections 951.095 and 951.18(2m) of the Criminal Code of Wisconsin are violated by one who causes injury to an animal that is used by a law enforcement agency or fire department to perform agency or department functions by intentionally striking, shoving, kicking, or otherwise subjecting the animal to physical contact and knows that the animal is used by a law enforcement agency to perform agency functions.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. (Name animal) was an animal used by a (law enforcement agency) (fire department) to perform (agency) (department) functions.
2. The defendant knew that the animal was used by a (law enforcement agency) (fire department) to perform (agency) (department) functions.
3. The defendant intentionally struck, shoved, kicked, or otherwise subjected the animal to physical contact.
4. Striking, shoving, kicking, or otherwise subjecting the animal to physical contact caused injury to the animal.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1981 was originally published in 1996 and revised in 1997. This revision was approved by the Committee in June 2004 and involved adoption of a new format.

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

This instruction is drafted for a violation of § 951.095 that is punished as a Class I felony pursuant to § 951.18(2m): "Any person who intentionally violates s. 951.095, knowing that the animal that is the victim is used by a law enforcement agency or fire department to perform agency or department functions or duties and causing injury to the animal, is guilty of a Class I felony."

Simple violations of § 951.095 are punished as Class B forfeitures. When a person "intentionally or negligently violates" the statute, the punishment is that of a Class A misdemeanor. See § 951.18(2m). Section 951.18(2m) further provides for another felony penalty in addition to the offense addressed by this instruction: "Any person who intentionally violates s. 951.095, knowing that the animal that is the victim is used by a law enforcement agency or fire department to perform agency or department functions or duties and causing death to the animal, is guilty of a Class H felony."

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1982 FAILING TO PROVIDE AN ANIMAL WITH SUFFICIENT FOOD AND WATER — §§ 951.13 and 951.18(1)

Statutory Definition of the Crime

Failing to provide an animal with sufficient food and water, as defined in §§ 951.13 and 951.18 of the Criminal Code of Wisconsin, is committed by one who owns or is responsible for confining or impounding an animal and (intentionally) (negligently)[1] fails to supply the animal with a sufficient supply of food and water.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (owned) (was responsible for confining) an animal.[2]
2. The defendant failed to supply the animal with a sufficient supply of food and water.
3. The defendant (intentionally) (negligently) failed to supply the animal with a sufficient supply of food and water.

   ["Intentionally" requires that the defendant acted with the mental purpose to fail to supply the animal with a sufficient supply of food and water or was aware that the conduct was practically certain to cause that result.][3]

   ["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[4] "Criminal negligence" means:

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- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1982 was originally published in 1984 and revised in 1989 and 1995. This revision was approved by the Committee in June 2004 and involved adoption of a new format and a change in the definition of "negligently."

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

Simple violations of the statutes relating to cruelty to animals are punished as Class C forfeitures. When a person "intentionally or negligently violates" the statutes, the punishment is that of a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in certain circumstances that do not apply to violations of § 951.13, the statute addressed by this instruction.

1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see Comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:
(a) Warm-blooded creature, except a human being;
(b) Reptile; or
(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so-called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

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3. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

4. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term "negligent" or "negligently." This offense is defined in §§ 951.02 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI-Criminal 925.

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1983 DOGNAPPING AND CATNAPPING — §§ 951.03 and 951.18(1)

Statutory Definition of the Crime

(Dognapping) (Catnapping) as defined in §§ 951.03 and 951.18 of the Criminal Code of Wisconsin, is committed by one who intentionally[1] takes the (dog) (cat) of another from one place to another without the owner's consent.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant took the (dog) (cat) of another from one place to another.
2. The owner of the (dog) (cat) did not consent to the taking.
3. The defendant acted intentionally.

   This requires that the defendant acted with the mental purpose to take the (dog) (cat) of another and knew that the (dog) (cat) belonged to another and knew that the owner did not consent to the taking.[3]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1983 was originally published in 1996. This revision was approved by the Committee in June 2004 and involved adoption of a new format.

This instruction is for one type of violation of § 951.03, Dognapping and Catnapping: taking a dog or cat from one place to another without the owner's consent. The violation is punished as a Class A misdemeanor if committed "negligently or intentionally." § 951.18(1).

The statute" does not apply to law enforcement officers or humane society agents engaged in the exercise of their official duties." The Committee concluded that exceptions like this are usually resolved at the pretrial motion stage. It does not become an issue at trial until there is some evidence that the exception may apply. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that "the defendant was not a (law enforcement officer) (humane society agent) engaged in the exercise of official duties." Appropriate additions should be made to the instruction.

1. Violations of § 951.03 become Class A misdemeanors if committed "intentionally or negligently." See § 951.18(1). The instruction uses the term "intentionally," the Committee having concluded that negligent dognappings or catnappings are unlikely to be criminally charged.

2. Section 951.03 also prohibits "caus[ing] such a dog or cat to be confined or carried out of this state or held for any purpose without the owner's consent." These options are not addressed in the instruction, which is drafted for violations involving a taking of the animal. For the other options, reference to the uniform instructions for kidnapping offenses might be helpful. See Wis JI-Criminal 1280 - 1282.

3. The definition of "intentionally" uses the mental purpose alternative, which the Committee believes is most likely to apply to this offense. "Intentionally" also applies to one who is "aware that his or her conduct is practically certain to cause that result." See § 939.23(3) and Wis JI-Criminal 923A and 923B. Section 939.23(3) also provides that "intentionally" requires that the "actor have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." With this offense, "intentionally" becomes applicable because it is set forth in the penalty section, § 951.18. See note 1, supra.

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1984 FAILING TO PROVIDE AN ANIMAL WITH PROPER SHELTER — §§ 951.14 and 951.18(1)

Statutory Definition of the Crime

Failing to provide an animal with proper shelter, as defined in §§ 951.14 and 951.18 of the Criminal Code of Wisconsin, is committed by one who owns or is responsible for confining or impounding an animal and (intentionally) (negligently)[1] fails to supply the animal with proper shelter.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (owned) (was responsible for confining) an animal.[2]

2. The defendant failed to proper shelter for the animal.

   Shelter is proper when it is sufficient to maintain the animal in good health.[3]

3. The defendant (intentionally) (negligently) failed to supply the animal with proper shelter.

   ["Intentionally" requires that the defendant acted with the mental purpose to fail to supply the animal with proper shelter or was aware that the conduct was practically certain to cause that result.][4]

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["Negligently" requires that the defendant's conduct amounted to "criminal negligence."[5] "Criminal negligence" means:

- the conduct created a risk of death or great bodily harm; and
- the risk of death or great bodily harm was unreasonable and substantial; and
- the defendant should have been aware that (his) (her) conduct created the unreasonable and substantial risk of death or great bodily harm.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1984 was originally published in 1984 and revised in 1989 and 1995. This revision was approved by the Committee in June 2004 and involved adoption of a new format and a change in the definition of "negligently."

1987 Wisconsin Act 332 renumbered the chapter containing crimes against animals from Chapter 948 to Chapter 951. The effective date of the change was July 1, 1989.

Simple violations of the statutes relating to cruelty to animals are punished as Class D forfeitures. When a person "intentionally or negligently violates" the statutes, the punishment is that of a Class A misdemeanor. See § 951.18(1). Section 951.18(1) further provides for a felony penalty in certain circumstances that do not apply to§ 951.14, the statute addressed by this instruction.

1. "Intentionally" or "negligently" violating the statutes relating to cruelty to animals makes the conduct criminal (see Comment, supra). The instruction is drafted on the premise that one of the alternatives will be selected.

2. The following definition is provided in § 951.01(1):

(1) "Animal" includes every living:
(a) Warm-blooded creature, except a human being;

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(b) Reptile; or
(c) Amphibian.

"The definition of 'animal' is based on § 346.20, Minn. Stats. Anno. (1971). The term includes not only animals strictly so-called but birds and other living warm-blooded creatures except people." Legislative Council Note to 1973 Senate Bill 16.

3. If more detailed explanation of "proper shelter" is required, see subsecs. (1) through (4) of sec. 951.14 which address indoor standards, outdoor standards, space standards, and sanitation standards, respectively.

4. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

5. The Committee concluded that "criminal negligence" applies to this offense because § 939.25(2) states: "If criminal negligence is an element of a crime in chs. 939 to 951 . . . the negligence is indicated by the term "negligent" or "negligently." This offense is defined in §§ 951.02 and 951.18 and the latter uses the term "negligently."

If reference to ordinary negligence is believed to be helpful in defining "criminal negligence," see Wis JI-Criminal 925.

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1986 INSTIGATING FIGHTS BETWEEN ANIMALS — § 951.08(1)

Statutory Definition of the Crime

Section 951.08(1) of the Criminal Code of Wisconsin is violated by one who intentionally [(instigates) (promotes)] [participates in the earnings from] [maintains or allows any place to be used for] a (cockfight) (dogfight).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(instigated) (promoted)] [participated in the earnings from] [maintained or allowed any place to be used for] a (cockfight) (dogfight).[1]
2. The defendant did so intentionally.

   This requires that the defendant acted with the mental purpose[2] to [(instigate) (promote)] [participate in the earnings from] [maintain or allow any place to be used for] a (cockfight) (dogfight).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1986 was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Penalties for violations of § 951.08(1) are set forth in § 951.18(2): a Class I felony for the first violation and a Class H felony for the second or subsequent violation. For a case charged as a Class H felony, the fact of the prior conviction would not be a fact that is submitted to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

1. The instruction provides for selecting "cockfight" or "dogfight," which the Committee believes are the most likely cases to be charged. The statute applies however, to additional conduct: ". . . bullfight or other fight between the same or different kinds of animals or between an animal and a person." § 951.08(1).

2. The Committee concluded that the "mental purpose" part of the definition of "intentionally" is most likely to apply to this offense. For a complete discussion of the meaning of "intentionally" see Wis JI-Criminal 923A and Wis JI-Criminal 923B.

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1988 KEEPING AN ANIMAL WITH INTENT THAT IT ENGAGE IN FIGHTING — § 951.08(2)

Statutory Definition of the Crime

Section 951.08(2) of the Criminal Code of Wisconsin is violated by one who owns, possesses, keeps, or trains any animal with the intent that the animal be engaged in an exhibition of fighting.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (owned) (possessed) (kept) (trained) an animal.[1]
2. The defendant did so with the intent that the animal be engaged in an exhibition of fighting.

   This requires that the defendant acted with the mental purpose[2] that the animal be engaged in an exhibition of fighting.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1988 was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Penalties for violations of § 951.08(2) are set forth in § 951.18(2): a Class I felony for the first violation and a Class H felony for the second or subsequent violation. For a case charged as a Class H felony, the fact of the prior conviction would not be a fact that is submitted to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

1. The Committee recommends selecting one of the terms in parentheses, but believes it is proper to submit all alternatives that are supported by the evidence.

2. The Committee concluded that the "mental purpose" part of the definition of "with intent that" is most likely to apply to this offense. For a complete discussion of the meaning of "intentionally" see Wis JI-Criminal 923A and Wis JI-Criminal 923B.

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2000 ABANDONMENT BY HUSBAND OR FATHER

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2000 was published in 1971. It applied to violations of Sec. 53.05(1) which defined a felony offense. That statute was repealed by 1985 Wisconsin Act 29 and replaced by § 940.27. An instruction for violations of § 940.27 is provided at Wis JI-Criminal 1264. This note was republished without change in 1995.

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2010 PATERNITY

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2010 dealt with the adjudication of paternity under § 52.21, et seq., 1963 Wis. Stats. Chapter 352, Laws of 1979, extensively changed paternity procedures, making Wis JI-Criminal 2010 obsolete. The instruction was withdrawn. Jury instructions for current paternity procedures will be published in Wis JI-Civil. This note was republished without change in 1995.

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2020 JUVENILE DELINQUENCY: COMPOSITE INSTRUCTION

2021 SAMPLE: DELINQUENCY UNDER CHAPTER 48: BURGLARY

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 2020 and 2021 were originally published in 1986 and revised in 1995. Their withdrawal was approved in February 2009.

1995 Wisconsin Act 77 changed the procedures for delinquency determinations — see Chapter 938, Juvenile Justice Code — that do not provide for a jury determination. See §938.31(2). The provisions took effect on July 1, 1996.

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2031 CONTEMPT OF COURT: PUNITIVE SANCTION — § 785.01

Statutory Definition of the Crime

Contempt of court, as defined in § 785.01(1)(b) of the Wisconsin Statutes, is committed by one who intentionally disobeys an order of a court.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. A court ordered the defendant to (describe terms of order) .[2]
2. The defendant had the ability to comply with that order.[3]
3. The defendant intentionally disobeyed that court order.

   "Intentionally" means that the defendant knew the court order had been issued and acted with the purpose to disobey it.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2031was originally published in 1990 and revised in 1995. This revision was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for "criminal contempt," more precisely termed "punitive sanction for contempt of court." The "punitive sanction" is set forth in § 785.04(2)(a) which provides that a fine of not more than $5,000 or imprisonment in the county jail for not more than one year or both may be imposed "after a finding of contempt of court in a nonsummary procedure." Nonsummary procedures for punitive sanctions are described in § 785.03(1)(b) which provides, inter alia, that the "complaint shall be processed under chs. 967-973." The Committee has concluded that regular criminal procedure is to be followed, including the giving of regular criminal jury instructions.

The court of appeals has ruled that punitive contempt is not a crime, and thus its penalty cannot be enhanced by reference to the general repeater statute, § 939.62. State v. Carpenter, 179 Wis.2d 838, 842, 508 N.W.2d 69 (Ct. App. 1993), quoting from McGee v. Racine County Circuit Court, 150 Wis.2d 178, 441 N.W.2d 308 (Ct. App. 1989): "Contempt proceedings are sui generis and are neither civil actions nor criminal prosecutions within the ordinary meaning of those terms."

The dismissal of a criminal complaint charging punitive contempt was reversed in State v. Chinavare, 185 Wis.2d 528, 518 N.W.2d 772 (Ct. App. 1994), the court holding that it is proper to charge someone with violating a court order as a party to the crime: "One directly violates a court order by having others do the things prohibited by the order even if those others are not bound by the order." 185 Wis.2d 528, 535.

Section 785.01(1)(bm) provides that contempt includes intentional "Violation of any provision of s. 767.117(1)," which prohibit certain conduct during the pendency of an action affecting the family.

Procedures relating to the contempt power of the court are addressed in CR-29, Wisconsin Judicial Benchbooks, Volume I.

1. This instruction is for one type of offense defined in subsection (1)(b) of § 785.01: "Disobedience, resistance or obstruction of the authority, process, or order of a court." The instruction is drafted in terms of disobeying an order of the court because the Committee concluded that in most contempt cases, a court order is issued and the contempt charge is based on the defendant's disobeying that order.

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It apparently is not appropriate to challenge the validity of the order in the context of the criminal prosecution based on failure to obey that order. In State v. Orethun, 84 Wis.2d 487, 267 N.W.2d 318 (1978), the Wisconsin Supreme Court affirmed a conviction for operating after revocation. The defendant had claimed that his revocation should have been deemed not to have occurred because a speeding conviction on which the revocation was based had been vacated. The court held that legal channels were available to challenge the speeding conviction and the revocation. Those are the remedies that must be pursued — a driver has to comply with the revocation until it is set aside through one of the proper channels.

The court in Orethun analogized the case to "that of the person who fails to comply with an injunction but then argues that he should not be held in contempt because the injunction was erroneously granted." 84 Wis.2d 487, 480. Getka v. Lader, 71 Wis.2d 237, 238 N.W.2d 87 (1976), was quoted:

> Setting aside the trial court injunction against the defendants does not, ipso facto, erase the contempt finding. . . . Where a court has jurisdiction over the subject matter and the parties, the fact that an order or judgment is erroneously or improvidently rendered does not justify a person in failing to abide by its terms. The subsequent appeal and reversal of the injunction here does not alter the obligation of the defendants in this case to initially comply with such injunction until it was stayed or set aside. [Footnote omitted.]

2. The Committee recommends describing the order that is the basis for the contempt charge.

3. The essence of this offense is an omission — the failure to obey a court order. Criminal liability for an omission generally requires the ability to perform the required acts. See State v. Williquette, 129 Wis.2d 239, 251, 385 N.W.2d 145 (1986), citing LaFave and Scott, Criminal Law, sec. 26 at 182. This general rule can be changed by the statutory definition of a particular offense. See, for example, § 948.22, Failure To Support, discussed in notes 5 and 10, Wis JI-Criminal 2152. The Wisconsin Supreme Court has held that ". . . it is essential in contempt cases that the thing ordered to be done be within the power of the person." In re Adam's Rib, Inc. (Kaminsky), 39 Wis.2d 741, 746, 159 N.W.2d 643 (1968).

4. "Intentionally" is defined in § 939.23(3) as either having the mental purpose to cause the result specified or being "aware that his conduct is practically certain to cause that result." Having the "mental purpose" is believed to be the most likely alternative for this offense. For definition of the other alternative, see Wis JI-Criminal 923B.

The meaning of "intentional" as used in § 785.01 was discussed in Shepard v. Outagamie County Circuit Court, 189 Wis.2d 279, 535 N.W.2d 764 (Ct. App. 1994). The court fell short of explicitly adopting the definition from § 939.23, but its decision is consistent with that definition of the term "intentionally."

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2040 VIOLATING A TEMPORARY RESTRAINING ORDER OR AN INJUNCTION — §§ 813.12, 813.122, 813.123, 813.125[1]

Statutory Definition of the Crime

Violating (an injunction) (a temporary restraining order), as defined in § _____[2] of the Wisconsin Statutes, is committed by one who knowingly violates (an injunction) (a temporary restraining order) issued under § _____[3] of the Wisconsin Statutes.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (An injunction) (A temporary restraining order) was issued against (name of defendant) under § _____ of the Wisconsin Statutes.

   (An injunction) (A temporary restraining order) is a court order prohibiting specified conduct.

   ADD THE FOLLOWING FOR VIOLATIONS OF § 813.12 WHEN SUPPORTED BY THE EVIDENCE

   [An injunction remains in effect even if the petitioner allows or initiates contact with the respondent or if the respondent is admitted into a dwelling that the injunction directs him or her to avoid.][4]

2. The defendant committed an act that violated the terms of the (injunction) (temporary restraining order).

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3. The defendant knew that the (injunction) (temporary restraining order) had been issued and knew that (his) (her) acts violated its terms.[5]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2040 was originally published in 1987 and revised in 1988, 1995, 2001, 2010, and 2011. This revision was approved by the Committee in December 2018; it updated the Comment and made non-substantive changes in the text.

Wis JI-Criminal 2040 is drafted for use for any one of the four restraining order/injunction statutes in chapter 813. See note 1, below. The statutes are essentially the same, though variations in the text are present. Violations of restraining orders may also constitute the offense of "harassment" as defined in § 947.013. See Wis JI-Criminal 1910, 1911, and 1912.

The constitutionality of § 813.12 was upheld in Schramek v. Bohren, 145 Wis.2d 695, 429 N.W.2d 501 (Ct. App. 1988).

For a discussion of cases involving harassment restraining orders under § 813.125, see the material following note 5.

A defendant cannot collaterally attack the validity of a harassment injunction [issued under § 813.125] in a criminal prosecution for the violation of that injunction. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

A judge's oral remarks relating to the scope of an injunction issued under § 813.125 modify the terms of the written order. State v. O'Dell, 193 Wis.2d 333, 532 N.W.2d 741 (1995). The court noted, however,

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that trial courts are "strongly encouraged" to incorporate all oral modifications into the written injunction. 193 Wis.2d 333, 344.

The restraining order statutes were amended by 1995 Wisconsin Act 71, to prohibit possession of firearms by persons subject to the orders. All persons enjoined under §§ 813.12 and 813.122 are prohibited from possessing firearms. See §§ 813.12(4m) and 813.122(5m), created by 1995 Wisconsin Act 71. Persons enjoined under §§ 813.123 and 813.125 may be prohibited from possessing firearms if a specific finding is made. See § 813.123(5m) and 813.125(4m). Possession of a firearm by persons subject to these injunctions is punishable as a violation of § 941.29. See Wis JI-Criminal 1344.

1. The instruction has been drafted for use for any one of the four restraining order/injunction offenses now defined by the Wisconsin Statutes:

§ 813.12 - Domestic Abuse
§ 813.122 - Child Abuse
§ 813.123 - Individuals at Risk
§ 813.125 - Harassment.

Note: Domestic abuse injunctions and orders under § 813.12 include an injunction or order "issued by a tribal court under a tribal domestic abuse ordinance adopted in conformity with this section." § 813.12(1)(e).

2. In the blank provided, insert one of the following:

§ 813.12(8) - for a domestic abuse case
§ 813.122(11) - for a child abuse case
§ 813.123(10) - for an individual at risk case
§ 813.125(7) - for a harassment case.

3. In the blank provided, insert one of the following if the case involves violation of an injunction:

§ 813.12(4) - for a domestic abuse case
§ 813.122(5) - for a child abuse case
§ 813.123(5) - for an individual at risk case
§ 813.125(4) - for a harassment case.

If a temporary restraining order is involved, substitute § 813.12(3), § 813.122(4), § 813.123(4), or § 813.125(3), as appropriate.

4. This is a paraphrase of the rules stated in § 813.12(4)(c); no change in meaning is intended. Similar provisions are <u>not</u> found in the other injunction statutes to which this instruction applies.

5. That the defendant "knowingly" violated the order is explicitly required by §§ 813.12(8) and 813.122(11). Section 813.123(10) requires that the defendant "intentionally violates" the order. "Knowingly" is absent from § 813.125(7), which establishes the criminal penalty for violations of harassment orders. The Committee concluded that "knowingly" should be required in the latter situation as well.

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Whether the order was properly served is relevant to the knowledge requirement since it is an effective way to prove that the defendant did have knowledge of the order. However, service of the injunction is not specifically dealt with in the instruction. In domestic abuse, child abuse and individual at risk cases, §§ 813.12(2), 813.122(2), and 813.123(2), respectively, provide that the "action commences with service of the petition." Thus, without service, there could be no action and no criminal charge for violating the injunction or temporary restraining order. There is no counterpart for this subsection in § 813.125 for harassment cases. However, in order to issue the harassment injunction, the court must have found that the temporary restraining order was served on the defendant, see § 813.125(4)(a)2. Therefore, the same result – no action without service – ought to follow in the harassment case, despite the difference between the statutes.

Statutes in each of the four types of cases require that notice of the injunction hearing be served. If the defendant did not appear at the hearing, proof of service would show that he has received notice that an injunction may be issued which will contain the same terms as the temporary restraining order. It is error to instruct the jury to "accept as conclusively proven" that the defendant was served with the order. State v. Gordon, 2002 WI App 53, ¶45, 250 Wis.2d 702, 641 N.W.2d 183.

Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), and State v. Sarlund, 139 Wis.2d 386, 407 N.W.2d 544 (1987), upheld the constitutionality of the harassment injunction statute, § 813.125. In the process, however, the court emphasized that to be valid, the injunctions had to be narrowly drawn: they "must be specific as to acts and conduct which are enjoined." The injunction in the Salamone case, restraining "any contact" with the petitioner, was held invalid because it described the prohibited conduct too broadly.

In the Committee's judgment, the injunction would be properly framed if it prohibited future "harassment." Section 813.125 allows the issuance of an injunction if the person has engaged in "harassment" under § 947.013. While a violation of § 947.013 is directly punishable as a Class B forfeiture, engaging in conduct prohibited by the criminal statute also justifies the issuance of an injunction. The injunction may order a person not to engage in any more "harassment," see § 813.125(4)(a). Violating the injunction is then punishable as a crime. That is, a person may not engage in another violation of § 947.013 without suffering criminal penalties under § 813.125. Such an injunction is valid because it only covers conduct prohibited by § 947.013. The definition of "harassment" found in that statute was upheld in the two cases cited above as providing sufficient notice of the prohibited conduct and not infringing on innocent or protected behavior.

Under this approach, a violation of § 947.013 supports the issuance of an injunction ordering the person not to violate § 947.013 again. A second violation of § 947.013 violates the injunction. This seems to avoid the overbreadth and vagueness problems of orders that prevent "all contact" or "any communication." And in the criminal action, the issues would be: (1) was there an order; and (2) did the defendant (knowingly) engage in "harassment" as defined in § 947.013 (which definition has been upheld as constitutional).

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2042 VIOLATING A FOREIGN PROTECTION ORDER — § 813.128

Statutory Definition of the Crime

Violating a foreign protection order, as defined in § 813.128 of the Wisconsin Statutes, is committed by one who knowingly violates a condition of a foreign protection order that is entitled to full faith and credit under § 806.247.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. A foreign protection order was issued against (name of defendant).
2. The foreign protection order was entitled to full faith and credit under § 806.247.
3. The defendant committed an act that violated a condition of the foreign protection order.[2]
4. The defendant knew that the foreign protection order had been issued and knew that (his) (her) acts violated its terms.

Definition of Foreign Protection Order

"Foreign protection order" means any temporary or permanent injunction or order of a civil or criminal court (of the United States) (of an Indian tribe) (of any other state) issued

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for preventing abuse, bodily harm, communication, contact, harassment, physical proximity, threatening acts or violence by or to a person, other than support or custody orders.[3]

Determination of Full Faith and Credit

"Full faith and credit" means that an order from a court outside the state is enforced as if the order was an order of a court in this state. An order shall be accorded full faith and credit if all of the following conditions are met:[4]

- the person against whom the order was issued received reasonable notice; and,
- the person against whom the order was issued received an opportunity to be heard that was sufficient to protect (his) (her) right to due process; and,
- the court that issued the order had jurisdiction over the parties and over the subject matter.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2042 was approved by the Committee in December 2001.

Section 813.128(1) provides that a "foreign protection order or modification of a foreign protection order that meets the requirements under s. 806.247(2) has the same effect as an order issued under s. 813.12, 813.122, 813.123, or 813.125, except that the foreign protection order or modification shall be enforced according to its own terms." Subsection (2) provides a criminal penalty [a fine of not more than $1,000 or imprisonment for not more than 9 months or both] for "a person who knowingly violates a condition of a foreign protection order. . ."

This instruction follows the approach used for violations of the other restraining order/injunction statutes. See Wis JI-Criminal 2040.

1. The Committee concluded that the "full faith and credit" issue is a fact that the jury must find. This is based on the conclusion that it is part of the definition of the crime in § 813.128(2): "A person who knowingly violates a condition of a foreign protection order . . . that is entitled to full faith and credit . . ."

This conclusion is consistent with the decision of the U.S. Supreme Court in United States v. Gaudin, 515 U.S. 506 (1995). That decision resolved a split among the federal circuits regarding whether "materiality" under a federal false swearing statute was a fact that the jury must decide. The court rejected the Government's argument that "materiality" was a legal question to which the right to a jury determination does not attach. The court stated:

> . . . [T]he resolution of the question before us seems simple. The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.
> 515 U.S. 506, 511.

2. Section 813.128(2) applies to one who "knowingly violates a condition of a foreign protection order or modification of a foreign protection order ..." The instruction refers only to violating a condition of the order, the Committee having concluded that it should be sufficient to cover a violation of a modification to an original order.

3. This is the definition of "foreign protection order" provided in § 806.247(1)(b) without change.

4. The requirements for "full faith and credit" are based on the conditions set forth in § 806.247(2)(a). Expert testimony may be required to establish that the procedures in the foreign jurisdiction meet these requirement.

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2044 VIOLATING A DOMESTIC ABUSE CONTACT PROHIBITION — § 968.075(5)

Statutory Definition of the Crime

Section 968.075(5) of the Criminal Code of Wisconsin is violated by one who, within 72 hours of an arrest for a domestic abuse incident, intentionally does not avoid [the residence of the alleged victim of the domestic abuse incident] [any premises temporarily occupied by the alleged victim] [contacting or causing any person to contact the alleged victim].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was arrested for a domestic abuse incident.

   "Domestic abuse" means _(identify the type of conduct specified in § 968.075(1)(a))_[1] engaged in by an adult person against [his or her (spouse) (former spouse)] [an adult with whom the person (resides) (formerly resided)] [an adult with whom the person has a child in common].

2. The defendant was advised orally and in writing[2] that (he) (she) avoid [the residence of the alleged victim of the domestic abuse incident] [any premises temporarily occupied by the alleged victim] [contacting or causing any person to contact the alleged victim].

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3. The defendant intentionally did not avoid [the residence of the alleged victim of the domestic abuse incident] [any premises temporarily occupied by the alleged victim] [contacting or causing any person to contact the alleged victim] within 72 hours of the arrest for a domestic abuse incident.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2044 was approved by the Committee in July 2012.

Violating the contact prohibition under § 968.075(5) was changed from a forfeiture to a crime punishable by a fine of not more than $10,000 or imprisonment for not more than 9 months or both by 2011 Wisconsin Act 267 [effective date: April 24, 2012].

The contact prohibition is set forth in § 968.075(5)(a). It applies "unless there is a waiver under par. (c)." The Committee concluded that the existence of a waiver should be treated as an affirmative defense: it is not an issue in the case until there is some evidence of its existence; then, the state must prove the absence of the waiver beyond a reasonable doubt to support a finding of guilt.

1. Section 968.075(1)(a)1. - 4. identify the following conduct that may constitute "domestic abuse":

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Violations of s. 940.225 (1), (2) or (3) refer to first, second, or third degree sexual assault. If that option is used, the crimes should be defined. See Wis JI-Criminal 1201 - 1218B.

2. Subsection (5)(b)1. of § 968.075 requires that a law enforcement officer "shall inform the arrested person orally and in writing" of the contact prohibition. Section § 968.075(b)3. provides that a failure to comply with the notice requirement "bars a prosecution under par. (a)."

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2050 BURDEN OF PROOF: FORFEITURE ACTIONS
2055 FIVE-SIXTHS VERDICT: FORFEITURE ACTIONS

[INSTRUCTIONS RENUMBERED — SEE WIS JI-CRIMINAL 140.1 AND 515.1]

COMMENT

Wis JI-Criminal 2050 and 2055 were originally published in 1962. They were renumbered Wis JI-Criminal 140.1 and 515.1, respectively, in 1993.

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2101A SEXUAL CONTACT — § 948.01(5)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE SEXUAL ASSAULT OF A CHILD OFFENSE.[1]

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[Sexual contact is an intentional touching of the (name intimate part) [2] of (name of victim) (by the defendant) (by another person upon the defendant's instruction)[3]. The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)][4]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part) [5] (of the defendant) (of another person upon the defendant's instruction),[6] if the defendant intentionally caused or allowed[7] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim) .)][8]

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FOR SEXUAL CONTACT INVOLVING INTENTIONAL EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON THE COMPLAINANT:

[Sexual contact is intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)[9] upon any part of the body clothed or unclothed of (name of victim).[10]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[11]]

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY:

[Sexual contact is ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.[12]

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[13]]

GIVE THE FOLLOWING IN ALL CASES.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OF A CHILD OFFENSE.

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COMMENT

Wis JI-Criminal 2101A was originally published in 1996 and revised in 1999, 2001, 2002, and 2003. This revision was approved by the Committee in October 2006; it reflected changes made by 2005 Wisconsin Acts 273 and 435.

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault of a child offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching; the other involving the purpose of the touching. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

A similar instruction is provided at Wis JI-Criminal 1200A for offenses in violation of § 940.225. This instruction differs in several ways, due to differences between the statutory definition of "sexual contact" provided in § 948.01(5), addressed in this instruction, and the definition of the same term provided in § 940.225(5)(b), addressed in Wis JI-Criminal 1200A. This instruction should be used only for violations of § 948.02.

The following definition of "sexual contact" is provided in § 948.01(5), as amended by 2005 Wisconsin Acts 273 and 435 (effective date: June 6, 2006):

(5) "Sexual contact" means any of the following:

(a) Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:

1. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

(b) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

(c) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

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1. The definition of "sexual contact" in § 948.01(5) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault of a child offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a sexual purpose. See note 4, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct, App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

A child's testimony referring to her "private," her "potty place," and "between her legs" was sufficient to support a jury finding that the defendant touched her "groin, vagina, or pubic mound." State v. Brunette, 220 Wis.2d 431, 453-54, 583 N.W.2d 174 (Ct. App. 1998).

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. § 948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for one of two prohibited purposes. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with at as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

The two purposes set forth as alternatives are the only two contained in the definition of "sexual contact" provided in § 948.01(5). The definition of "sexual contact" in § 940.225(5)(b) includes touching which "contains the elements of actual or attempted battery . . ." The Committee has interpreted this as a "purpose to cause bodily harm," but note that this purpose does not apply to offenses under § 948.02.

The instruction phrases the two alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

5. See note 2, supra.

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6. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

7. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "caused or allowed" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit. The "or allowed" alternative was added after the Wisconsin Court of Appeals approved an instruction to which it had been added. State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). In Traylor, the court rejected the defendant's argument that sexual contact requires an affirmative act and that mere passivity is not "intentional touching" as contemplated by the statute:

> . . . the defendant does not have to initiate sexual contact with a child. If the defendant allows the contact, that is sufficient to constitute intentional touching because it indicates that the defendant had the requisite purpose of causing sexual arousal or gratification. 170 Wis.2d 393, 404.

In a footnote, the court emphasized that there must be evidence that a defendant allowed the touching:

> The mere fact of a child's touching an adult does not raise the inference [that the defendant sanctioned the touching for the purpose of sexual arousal or gratification]. There might indeed be evidence in a specific case that the adult called an immediate halt to this activity. Absent other evidence that the event was sanctioned by the adult, the mere fact that a touching took place is not the same as "allowing" it. 170 Wis.2d 393, 404, note 2.

Applied literally to a case where the victim is caused to touch the defendant, § 948.01(5)(a) requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts . . ." The Committee concluded that the Traylor decision interpreted this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused or allowed."

8. See note 4, supra.

9. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

10. This is the type of "sexual contact" defined in sub. (5)(b) of § 948.01. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

11. See note 4, supra.

12. This is the type of "sexual contact" defined in sub. (5)(c) of § 948.01. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

13. See notes 4 and 5, supra.

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2101B SEXUAL INTERCOURSE — § 948.01(6)

Meaning of "Sexual Intercourse"

INSERT THE ALTERNATIVE[S] SUPPORTED BY THE EVIDENCE INTO THE INSTRUCTION ON THE SEXUAL ASSAULT OFFENSE.

["Sexual intercourse" means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.][1]

["Sexual intercourse" includes (cunnilingus) (fellatio).

(Cunnilingus means oral contact with the clitoris or vulva.)[2]

(Fellatio means oral contact with the penis.)[3]]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[The act of sexual intercourse must be either by the defendant or upon the defendant's instruction.][4]

["Sexual intercourse" does not include an intrusion for a proper non-sexual purpose, such as a medical examination or appropriate child care or treatment.][5]

COMMENT

Wis JI-Criminal 2101B was originally published in 1996 and revised in 2001, 2006, and 2007. This revision added bracketed material to the text at footnote 5 and was approved by the Committee in February 2010.

The definitions provided here were formerly provided in each instruction for a sexual assault of a child offense involving sexual intercourse. The 1996 revision combined sexual contact and sexual intercourse offenses into one instruction, making it necessary to refer to this instruction for definition of "sexual intercourse" and to Wis JI-Criminal 2101A for definition of "sexual contact."

The 2006 revision changed the definitions of "cunnilingus" and "fellatio." See footnotes 2 and 3.

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A similar instruction is provided in Wis JI-Criminal 1200B for sexual assault offenses under § 940.225. Though there is one difference in the definitions of "sexual intercourse" found in § 948.01(6) and § 940.225(5)(c), the Committee concluded that no substantive difference is intended. Thus, the text of Wis JI-Criminal 2101B and Wis JI-Criminal 1200B is the same. Note that both the § 948.01(6) and § 940.225(5)(c) definitions are substantially broader than the one provided in § 939.22(36).

1. The definition of "sexual intercourse" is a paraphrase of the complete statutory definition found in § 948.01(6). NOTE: The definition in § 948.01(6) is substantially broader than the one provided in § 939.22(36) and is essentially the same as the one provided in § 940.225(5)(b).

2. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, 289 Wis.2d 222, 710 N.W.2d 482, which held that defining cunnilingus as "oral stimulation . . ." is not required by the "statutory scheme of the sexual assault law" and "offends the principles underpinning the sexual assault law." Par. 14. The former definition was taken from Webster's New Collegiate Dictionary, but the court of appeals held that "a standard dictionary definition should not by default become the legal definition of a term if it unfairly or inaccurately states the law or misconveys the legislative intent." Par. 17. The court stated: "We think a better resource is BLACK'S LAW DICTIONARY 380 (6th ed. 1990) which more neutrally defines cunnilingus as '[a]n act of sex committed with the mouth and the female sexual organ.'" Par. 17. The Committee decided not to use that definition because it refers to a "sex act," which is inconsistent with the emphasis of Harvey that a purpose of the sexual assault law was to recognize that sexual assaults were crimes of violence, not of sexual passion. Par. 15. As noted in the Harvey decision, the current edition of Black's does not define the term. [See Par. 17, footnote 6.] The Committee believes the revised definition in the instruction is faithful to the substance of the Harvey decision.

3. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, see note 2, supra. Harvey was concerned only with the definition of "cunnilingus," but the Committee concluded that the logic of the court's analysis would also apply to defining fellatio as "oral stimulation," which the instruction formerly did. The former definition had been approved in State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

4. This phrase appears in the definition of "sexual intercourse" in § 948.01(6) and in the similar definition found in § 940.225(5)(b).

In State v. Olson, 2000 WI App. 158, 238 Wis.2d 74, 616 N.W.2d 144, the court construed the definition provided in § 948.01(6) to require that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to perform one of them on him- or herself." Olson, ¶10. The Committee concluded that the bracketed sentence in the instruction adequately addresses the Olson requirement. The Olson decision also implies that "allowing" the sexual intercourse to take place may also satisfy the statute (see ¶12), but the holding is limited to the "upon the defendant's instruction" issue.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, supra, to conclude that the entire definition in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual

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intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction."

5. This statement is based on State v. Lesik, 2010 WI App 12, ___ Wis.2d ___, ___ N.W.2d ___, [2008 AP 3072-CR]. The court of appeals construed the definition of "sexual intercourse" in § 948.01(6) narrowly and agreed with the trial court's conclusion that "it would be 'patently and obviously absurd' to make medical personnel and parents guilty of a Class B felony for performing 'certain appropriate conduct relative to proper treatment of children.'" Lesik, ¶10. The court of appeals held that the trial court was correct in giving the statute a limiting construction by adding the following to the jury instruction:

> "Sexual intercourse" does not, however include such an intrusion for a proper non-sexual purpose, such as a medical examination or appropriate child care or treatment.

Lesik, ¶5.

Also see, State v. Neumann, 179 Wis.2d 687, 712, n. 14, 508 N.W.2d 54 (Ct. App. 1993), reaching the same conclusion with respect to the definition of "sexual intercourse" applicable to prosecutions under § 940.225.

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2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 [EFFECTIVE DATE: MARCH 27, 2008] AND 2013 WISCONSIN ACT 167 [EFFECTIVE DATE: MARCH 29, 2014]

Background

Section 948.02 was amended by both 2005 Wisconsin Act 430 and 2005 Wisconsin Act 437. The changes were inconsistent with one another, so the Revisor of Statutes published the statute as amended by Act 437. The statute as amended by Act 430 was printed immediately following that version in the 2005-06 Wisconsin Statutes – in boldface type. A study committee of the Wisconsin Legislative Council was convened to review the matter, and issued a report with recommendations for additional legislation. The Legislative Council draft was introduced in both houses: 2007 Assembly Bill 209 and 2007 Senate Bill 103. Senate Bill 103 was enacted as 2007 Wisconsin Act 80 [effective date: March 27, 2008.] Section 948.02(1)(e) was later amended by 2013 Wisconsin Act 167.

Summary: Offenses Defined in § 948.02

As amended by 2007 Wisconsin Act 80 and 2013 Wisconsin Act 167, § 948.02(1) defines 5 types of first degree sexual assault of a child. See Wis JI-Criminal 2102A-E. Section 948.02(2), which defines second degree sexual assault of a child, was not affected by Act 80. See Wis JI-Criminal 2104.

Because some of the offense definitions differ only slightly, the Committee concluded that a summary of the elements, penalties, and related issues might be helpful.

§ 948.02(1) 1st degree sexual assault of a child

(am) • sexual contact or sexual intercourse
• with a person who has not attained the age of 13
• causes great bodily harm
[Wis JI-Criminal 2102A]

Class A felony. Minimum of 25 years confinement before extended supervision eligibility – § 939.616(1g).

(b) • sexual intercourse
• with a person who has not attained the age of 12
[Wis JI-Criminal 2102B]

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Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

(c) • sexual intercourse
• with a person who has not attained the age of 16
• by use or threat of force or violence
[Wis JI-Criminal 2102C]

Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

(d) • sexual contact
• with a person who has not attained the age of 16
• by use or threat of force or violence
• by a person who is at least 18 years of age
[Wis JI-Criminal 2102D]

Class B felony. Mandatory minimum term of confinement of 5 years – § 939.616(2).

(e) • sexual contact or sexual intercourse
• with a person who has not attained the age of 13
[Wis JI-Criminal 2102E]

Class B felony.
NOTE: 2013 Wisconsin Act 167 amended § 948.02(1)(e) by adding "sexual intercourse." [Effective date: March 29, 2014.]

§ 948.02(2) 2nd degree sexual assault of a child
[Not affected by 2007 Wisconsin Act 80]

• sexual contact or sexual intercourse
• with a person who has not attained the age of 16
[Wis JI-Criminal 2104]

Class C felony.
NOTE: Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: "This section does

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not apply if s. 948.093 applies." Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19.

Mandatory Minimum Sentences – § 939.616

As noted above, § 939.616 provides for mandatory minimum sentences for violations of § 948.02(1)(am) through (d). In State v. Lalicata, 2012 WI App 138, 345 Wis.2d 342, 824 N.W.2d 921, the court of appeals held that the mandatory minimum sentence under § 939.616(1r) for convictions under § 948.02(1)(b) is "truly mandatory, with no probation option." ¶1.

Section 939.616(3) provides: ". . . The mandatory minimum sentences in this section do not apply to an offender who was under 18 years of age when the violation occurred."

Penalty Increase for Sexual Assault or Physical Abuse of a Child by a Child Care Provider – § 939.635

Section 939.635 was created by 2011 Wisconsin Act 82 [effective date: December 9, 2011]. It allows an increase of not more than 5 years for violations of §§ 948.02, 948.025, 948.03(2) and (3), and 948.03(5)(a)1., 2., 3., and 4. if the defendant committed the crime against a child for whom the defendant was providing child care for compensation. Wis JI-Criminal 2115 provides a special question to be added to the applicable offense instruction when the enhanced penalty authorized by § 939.635 is alleged in the charging document and the evidence would support a finding that the penalty-increasing facts are established.

Lesser Included Offenses

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

COMMENT

Wis JI-Criminal 2102 Introductory Comment was originally published in 2008 and revised in 2013 and 2015. The 2013 revision added reference to State v. Lalicata. The 2015 revision reflected a change made in § 948.02(1)(e) by 2013 Wisconsin Act 167. The 2016 revision corrected editorial errors. This revision was approved by the Committee in December 2018; it added a section describing the penalty increase under § 939.635.

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2102A FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: CAUSING GREAT BODILY HARM — § 948.02(1)(am)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(am) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 13 years and causes great bodily harm to that person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

2. (Name of victim) was under the age of 13 years at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

   Consent to sexual [contact] [intercourse] is not a defense.[3]

3. The defendant caused great bodily harm to (name of victim).

   "Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or

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protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[4]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102A was approved by the Committee in April 2008. It reflects changes made in § 948.02 by 2007 Wisconsin Act 80.

This instruction is drafted for violations of § 948.02(1)(am) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. A violation of this subsection is a Class A felony.

As revised by Act 80, the statute defines the crime in the same manner as § 940.225(1)(a): "Has sexual contact or sexual intercourse . . . and causes . . . great bodily harm." Under § 940.225(1)(a), the act itself need not cause the great bodily harm. See Wis JI-Criminal 1201, footnote 1, and State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). The Wisconsin Legislative Council Act Memo for 2007 Wisconsin Act 80 states that the revision "clarifies that harm to the victim caused by the offender at the time of a first-degree sexual of a child, and not necessarily caused by the sexual intercourse or contact, would satisfy the great bodily harm element . . ."

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

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Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

4. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

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2102B FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 12 YEARS — § 948.02(1)(b)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who has not attained the age of 12 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).
2. (Name of victim) was under the age of 12 years at the time of the alleged sexual intercourse.

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

   Consent to sexual intercourse is not a defense.[3]

Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102B was approved by the Committee in April 2008; it reflects changes made by 2007 Wisconsin Act 80.

This instruction is drafted for violations of § 948.02(1)(b) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008.] The offense is a Class B felony.

NOTE: The age limit for this offense is that the victim "has not attained the age of 12 years." The similar offense involving sexual contact applies to a victim who "has not attained the age of 13 years." See § 948.02(1)(e).

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2102C FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS BY USE OR THREAT OF FORCE OR VIOLENCE— § 948.02(1)(c)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who has not attained the age of 16 years by the use or threat of force or violence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).

2. (Name of victim) was under the age of 16 years at the time of the alleged sexual intercourse.

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

3. The defendant had sexual intercourse with (name of victim) by the use or threat of force or violence.

   The use or threat of force of violence may occur at any time before or as part of the sexual intercourse.[3]

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As a matter of law, a person who has not attained the age of 16 years cannot consent to sexual intercourse. Any consideration of the conduct of (name of victim) must be limited to determining whether the defendant had sexual intercourse by the use or threat of force or violence.[4]

Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102C was approved by the Committee in April 2008. It reflects changes made in § 948.02 by 2007 Wisconsin Act 80.

This instruction is drafted for violations of § 948.02(1)(c) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. The offense is a Class B felony.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. This is based on State v. Hayes, 2003 WI App 99, 264 Wis.2d 377, 633 N.W.2d 351, discussed in footnote 2, Wis JI-Criminal 1208.

4. This material is used in place of the statement in other instructions for child sexual assault offenses that "consent is not a defense" because the latter could be interpreted as inconsistent with the defendant's right to challenge proof of the "by the use or threat of force or violence" element by reference to conduct of the victim. For a similar situation, see Wis JI-Criminal 926, Contributory Negligence.

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2102D FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS BY USE OR THREAT OF FORCE OR VIOLENCE BY A PERSON WHO HAS ATTAINED THE AGE OF 18 YEARS — § 948.02(1)(d)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(d) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 18 years who has sexual contact with a person who has not attained the age of 16 years by the use or threat of force or violence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual contact with (name of victim).
2. The defendant had attained the age of 18 years.
3. (Name of victim) was under the age of 16 years at the time of the alleged sexual contact.

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

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4. The defendant had sexual contact with (name of victim) by the use or threat of force or violence.

The use or threat of force of violence may occur at any time before or as part of the sexual contact.[3]

As a matter of law, a person who has not attained the age of 16 years cannot consent to sexual contact. Any consideration of the conduct of (name of victim) must be limited to determining whether the defendant had sexual contact by the use or threat of force or violence.[4]

[The phrase "use or threat of force or violence" includes forcible sexual contact or force used as the means of making sexual contact.][5]

Meaning of Sexual Contact

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102D was approved by the Committee in April 2008. It reflects changes made in § 948.02 by 2007 Wisconsin Act 80.

Section 948.02(1)(d) was created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. The offense is a Class B felony.

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Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. This is based on State v. Hayes, 2003 WI App 99, 264 Wis.2d 377, 633 N.W.2d 351, discussed in footnote 2, Wis JI-Criminal 1208.

4. This material is used in place of the statement in other instructions for child sexual assault offenses that "consent is not a defense" because the latter could be interpreted as inconsistent with the defendant's right to challenge proof of the "by the use or threat of force or violence" element by reference to conduct of the victim. For a similar situation, see Wis JI-Criminal 926, Contributory Negligence.

5. See State v.Bonds, 165 Wis.2d 27, 477 N.W.2d 265 (1991), discussed in footnote 5, Wis JI-Criminal 1208.

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2102E FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS — § 948.02(1)(e)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(e) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 13 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

2. (Name of victim) was under the age of 13 years at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

   Consent to sexual [contact] [intercourse] is not a defense.[3]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2102E was originally published in 2008. This revision was approved by the Committee in June 2014; it reflects changes made in § 948.02 by 2013 Wisconsin Act 167.

This instruction is drafted for violations of § 948.02(1)(e) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008] and as amended by 2013 Wisconsin Act 167 [effective date: March 29, 2013].

2013 Wisconsin Act 167 amended § 948.02(1)(e) to add "sexual intercourse." Before that amendment, sub. (1)(e) applied only to "sexual contact."

NOTE: The age limit for this offense is that the victim "has not attained the age of 13 years." Section 948.02(1)(b) prohibits "sexual intercourse with a person who has not attained the age of 12 years."

1. See § 939.23(6).

2. See § 939.43(2).

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2104 SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS — § 48.02(2)

Statutory Definition of the Crime

Second degree sexual assault of a child, as defined in § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 16 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

2. (Name of victim) was under the age of 16 years at the time of the alleged sexual [contact] [intercourse].

Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

Consent to sexual [contact] [intercourse] is not a defense.[3]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1989 as Wis JI-Criminal 2104 [for sexual intercourse offenses] and Wis JI-Criminal 2105 [for sexual contact offense]. It was revised in 1996 to combine the instructions as Wis JI-Criminal 2104. The 2001 revision adopted a new format, made nonsubstantive changes to the text, and updated the Comment. The 2008 revision added a reference to 2007 Wisconsin Act 80 to the Comment. This revision was approved by the Committee in June 2018; it reflects a change made by 2017 Wisconsin Act 174.

Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: "This section does not apply if s. 948.093 applies." Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19. The Committee concluded that any factual discrepancies regarding the applicability of § 948.093 would likely be resolved before trial and in any event should be treated in the same manner as statutory exceptions. The Committee's judgment has been that statutory exceptions are best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise that issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See the Comment to Wis JI-Criminal 1335B explaining the application of this approach to exceptions to the prohibition on carrying a concealed weapon.

This instruction is for two of the types of second degree sexual assault of a child defined by § 948.02(2): sexual contact or sexual intercourse with a person who has not attained the age of 16 years.

2008 Wisconsin Act 80 made significant changes in subsection (1) of § 948.02(2). Subsection (2) was not affected.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

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Second degree sexual assault of a child under § 948.02(2) is a lesser included offense of first degree sexual assault of a child under § 948.02(1) and is properly submitted when the evidence supports a reasonable doubt about the child's age. State v. Moua, 215 Wis.2d 511, 573 N.W.2d 2020 (Ct. App. 1997).

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. See § 939.23(6).

2. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's ages nor evidence regarding the cause for or reasonableness of that is relevant." ¶3.

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2105A ATTEMPTED SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS: ACTUAL CHILD — §§ 948.02(2); 939.32

Statutory Definition of the Crime

Attempted second degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual (contact) (intercourse) with a person who has not attained the age of 16 years, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended[1] to have sexual [contact] [intercourse] with (name of victim).

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

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2. (Name of victim) was under the age of 16 years.

Knowledge of (name of victim)'s age is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual [contact] [intercourse] with (name of victim) except for the intervention of another person or some other extraneous factor.[4]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2105A was approved by the Committee in August 2004.

This instruction provides a model for attempted second degree sexual assault of a child based on an attempt to assault an actual child. It combines Wis JI-Criminal 2104 and 580 but departs from the format recommended by the general instruction on attempt and involves three elements: the first two being the elements of the completed crime and the third being the definition of attempt.

A separate instruction is provided for cases based on attempts to assault what turns out to be a fictitious child, which result from "sting" operations based on electronic communications. See Wis JI-Criminal 2105B.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. See State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts.

2. Section 939.23(6).

3. Section 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's age nor evidence regarding the cause for or reasonableness of that belief is relevant." ¶3.

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4. The definition of "attempt" is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

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2105B ATTEMPTED SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS: FICTITIOUS CHILD — §§ 948.02(2); 939.32

Statutory Definition of the Crime

Attempted second degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual (contact) (intercourse) with a person who has not attained the age of 16 years, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intended to have sexual [contact] [intercourse] with another person.

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. The defendant believed that the person was under the age of 16 years.[1]

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3. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual [contact] [intercourse] with that person except for the intervention of another person or some other extraneous factor.[2]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual (contact) (intercourse) with that person.[3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2105B was approved by the Committee in August 2004.

This instruction provides a model for attempted second degree sexual assault of a child based on an attempt to assault what turns out to be a fictitious child, which result from "sting" operations based on electronic communications. It combines Wis JI-Criminal 2104 and 580. A separate instruction is provided for cases based on attempts to assault an actual child. See Wis JI-Criminal 2105A.

Prosecutions based on activities directed toward fictitious children have been upheld in connection with charges of enticing a child under § 948.07 and sexual assault of a child under § 948.02.

In State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

> . . . attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, 242 Wis.2d 693,626 N.W.2d 359, where the court of appeals reached the same conclusion: "the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact." 2001 WI APP 93, ¶28.

State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, and State v. Brienzo, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700, held that prosecutions for attempted sexual assault of a child can also be maintained in "internet sting" situations. ". . . [T]he reasoning in Koenck and Robins is equally applicable to the charge of attempted second-degree sexual assault of a child." Grimm, 258 Wis.2d 166, ¶10. Brienzo held that "the crime of attempted sexual assault of a child by means of sexual intercourse is a crime known to law. A defendant may have the intent to engage in sexual intercourse and may engage in acts in furtherance of that intent. When he or she does, he or she is liable for that attempt." 267 Wis.2d 349, ¶21.

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Also see § 948.075, which prohibits use of a computerized communication system to facilitate a child sex crime. Wis JI-Criminal 2135 provides a model for violations of that statute.

1. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact or intercourse with a child in violation of § 948.02(2), for which this instruction is drafted, the victim must be under the age of 16, so the defendant's belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis.2d 298,646 N.W.2d 287: "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 253 Wis.2d 298, ¶34.

The two cases dealing with attempted sexual assault of a child also contain statements supporting this conclusion: "The facts alleged and their reasonable inferences permit the conclusion that [the defendant] intended to have sexual contact with a person he believed to be under the age of sixteen." State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, ¶20; State v. Brienzo, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700, ¶25.

2. The definition of "attempt" is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

3. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, that "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 253 Wis.2d 298, ¶34.

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2106 SEXUAL ASSAULT OF A CHILD: FAILURE TO ACT TO PREVENT SEXUAL INTERCOURSE OR SEXUAL CONTACT — § 948.02(3)

Statutory Definition of the Crime

Failure to act to prevent sexual assault of a child, as defined in § 948.02(3) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has not attained the age of 16 years, if that person has knowledge that another person (intends to have) (is having) (has had) sexual (intercourse) (contact) with a child, is physically and emotionally capable of taking action which will prevent sexual (intercourse) (contact) from (taking place) (being repeated), fails to take that action, and whose failure to act [exposes the child to an unreasonable risk that (intercourse) (contact) may occur between the child and the other person] [facilitates the sexual (intercourse) (contact) that does occur between the child and the other person].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person responsible for the welfare of a child, (name of victim).

A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[1]

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2. (Name of victim) was under the age of 16 years[2] at the time of the alleged offense.

3. (Name of principal) [3] (intended to have) (was having) (had) sexual (intercourse) (contact) with (name of victim).

4. The defendant had knowledge[4] that (name of principal) (intended to have) (was having) (had) sexual (intercourse) (contact) with (name of victim).

5. The defendant was physically and emotionally capable of taking action which would have prevented the sexual (intercourse) (contact) from (taking place) (being repeated).

6. The defendant failed to take action that would have prevented the sexual (intercourse) (contact) from (taking place) (being repeated).

7. The defendant's alleged failure to act [exposed the child to an unreasonable risk that sexual (intercourse) (contact) may occur] [facilitated the sexual (intercourse) (contact) that occurred between (name of victim) and (name of principal)].

["Facilitate" means to make easier.][5]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2106 was originally published in 1996 and revised in 2002. This revision was approved by the Committee in December 2008. It involved updating footnote 1.

Section 948.02 defines crimes relating to the sexual assault of children. Subsection (1) defines first degree sexual assault — see Wis JI-Criminal 2102. Subsection (2) defines second degree sexual assault — see Wis JI-Criminal 2104. Subsection (3), addressed by this instruction, imposes liability for failing to act to prevent the sexual assault of a child who has not attained the age of 16 years.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B.

As revised in 2001, the instruction includes bracketed or parenthetical material that cover all the alternative ways of committing the offense defined by § 948.02(3), including exposing the child to an unreasonable risk that a sexual assault will occur or be repeated.

In State v. Carol M.D., 198 Wis.2d 162, 542 N.W.2d 476 (Ct. App. 1995), the court affirmed multiple charges of failing to act to prevent sexual assault. Carol was informed by her son that Carol's live-in boyfriend had sexually assaulted him on a number of occasions. Carol confronted the boyfriend and he denied the assaults. Carol did nothing further. The boyfriend allegedly assaulted the son nine more times during September 1994. The son did not inform Carol of any of those assaults. Carol was charged under § 948.02(3) for failing to act to prevent the September 1994 assaults. The court of appeals held that she can be charged with nine counts — one for each of the assaults allegedly committed by the boyfriend. "[A] defendant may be convicted of more than one count under this statute if knowledge of the prior sexual assault is accompanied by failure to take action on each separate occasion." 198 Wis.2d 162, 168.

A similar provision relating to physical abuse of a child is found in § 948.03(4). See Wis JI-Criminal 2108.1. The Wisconsin Supreme Court has stated that "[t]he legislature deliberately enacted sec. 948.03(4) to penalize the conduct described in the Williquette decision." State v. Rundle, 176 Wis.2d 985, 999, 500 N.W.2d 916 (1993). That reference is to State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), where the Wisconsin Supreme Court held that a person could violate the prior child abuse statute (§ 940.201, 1985-86 Stats.) by failing to protect children from a risk of physical abuse by another. That statute required that the defendant "subject the child to cruel maltreatment," which the court found was established where the defendant mother was shown to have failed to act in the face of repeated abuse of her children by the children's father. The Williquette court also recognized that general omissions liability exists in Wisconsin, notwithstanding the fact that no specific statute exists. 129 Wis.2d 239, 251-55.

1. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

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See Wis JI-Criminal 2106A for discussion of authorities relating to "person responsible for the child's welfare."

2. For purposes of offenses under Chapter 948, "child" is generally defined as "a person who has not attained the age of 18 years." § 948.01(1). However, § 948.02(3) applies only to a person responsible for the welfare of a child who has not attained the age of 16 years.

3. The "principal" is the person who intends to have, was having, or had sexual intercourse or contact with the child. The defendant accused of the crime addressed by this instruction is charged with failing to act to prevent that sexual intercourse or contact from taking place or being repeated.

4. This element was revised in 2001 to use the words of the statute: "has knowledge that." The previous version of the instruction substituted "knew or believed," based on the definition of "know" in § 939.23(2): "'Know' requires only that the actor believes that the specified fact exists." The Committee concluded that in the context of this offense, it may be confusing to introduce the concept of "believes." That is, a defendant may "have knowledge of" facts that indicate sexual activity but may not "believe" that the activity is taking place. Repeating the words of the statute was believed to be the better approach.

5. This is based on a typical dictionary definition of "facilitate." See The American Heritage Dictionary Of The English Language, Third Edition (1992).

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2106A LAW NOTE: "PERSON RESPONSIBLE FOR THE CHILD'S WELFARE" — § 948.01(3)

Chapter 948 Offenses

The term "person responsible for the child's welfare" is currently used in five offense definitions in Chapter 948:

- 948.02(3) Sexual assault of a child; failure to act
- 948.03(4)(a) Physical abuse of a child; failing to act to prevent great bodily harm
- 948.03(4)(b) Physical abuse of a child; failing to act to prevent bodily harm
- 948.21(1) and (2) Neglecting a child
- 948.40(2) Contributing to the delinquency of a child; by a "person responsible . . ."

Chapter 948 Definition

Section 948.01(3) defines the term as follows:

> "Person responsible for the child's welfare" includes the child's parent; stepparent; guardian; foster parent; an employee of a public or private residential home, institution, or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

The Committee concluded that the § 948.01(3) definition applies to all Chapter 948 offenses even though there is a slight difference in the wording of the phrase in § 948.02(3), which refers to "a person responsible for the welfare of a child."

Compare Privilege of Parental Discipline

Note that the same phrase – "person responsible for the child's welfare" – is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5). However, that statute provides its own definition, which differs slightly from the Chapter 948 definition. Compare § 939.45(5)(a)3. with § 948.01(3).

Penalty Enhancers Repealed

The term was formerly used in penalty enhancers that applied to violations of §§ 948.02, 948.025, and 948.03. Those provisions were repealed by 2001 Wisconsin Act 109 ["TIS II"]; effective date: February 1, 2003.

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Case Law Interpreting the Term

In State v. Sostre, 198 Wis.2d 409, 542 N.W.2d 774 (1996), the Wisconsin Supreme Court held that a live-in boyfriend, who was a volunteer caretaker of a child, was a "person . . . responsible for the welfare of [a] child" under § 948.01(3). The defendant had lived with the mother of the victim for about three years. During this time the defendant did everything the mother did with regard to taking care of the children, including feeding and bathing them. The child considered the defendant his father or stepfather, called him "Poppy," and had a father-son relationship with the defendant. The definition of "person responsible . . ." includes those who are "employed by one legally responsible for the child's welfare to exercise temporary control or care for the child." The court held:

> One of the common meanings of the word "employed" is to "engage the service of" or "to make use of." Under these facts, it seems clear that the mother made use of the services of the defendant, or engaged the services of the defendant, in order to take care of her child when it was necessary for her to be away. In other words, the defendant was clearly "employed" by a person "legally responsible" for a child to "care for that child."
> 198 Wis.2d 409, 415

The fact that the word "employed" is usually equated with economic payment for services does not require a different result. Nor does the fact that a person in this defendant's position may not qualify as a "person responsible" for purposes of the privilege of parental discipline defined in § 939.45(5). That definition does not include the phrase "employed by one legally responsible . . ." that was at issue in this case. [State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), held that a live-in boyfriend was not covered by the privilege.] The court concluded the legislature specifically and deliberately defined the same term differently in the two statutes.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21, Neglecting a Child. State v. Evans, 171 Wis.2d 471, 492 N.W.2d 141 (1992). The definition of "person responsible . . ." in § 948.01(3) applies to § 948.21.

In State v. Ward, 228 Wis.2d 301, 596 N.W.2d 301 (Ct. App. 1999), the court held that "person responsible . . ." under § 948.02(3) applied to an unpaid, volunteer babysitter whose husband sexually assaulted children of a neighbor. The evidence was sufficient to show that the defendant was employed by the parent in the sense that she was "used by the child's legal guardian to act as a caretaker for the child." 228 Wis.2d 301, 307, citing Sostre, cited above.

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"A seventeen-year-old employed by a parent to care for the parent's child can be a person responsible for the welfare of the child. . . . [She] became a voluntary caretaker of [the child] and, as such, she was a person responsible for his welfare." State v. Hughes, 2005 WI App 155, 285 Wis.2d 388, 702 N.W.2d 87.

COMMENT

Wis JI-Criminal 2106A was originally published in 2009. This revision was approved by the Committee in July 2009.

This Law Note is intended to collect authority relating to the term "person responsible for the welfare of a child" as it is used in Chapter 948 and in § 939.45(5).

The 2010 revision deleted reference to "treatment foster parent," which was removed from the definition in § 948.01(3) by 2009 Wis Act 28 (Section 3352).

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2107 REPEATED ACTS OF SEXUAL ASSAULT OF A CHILD — § 948.025

Statutory Definition of the Crime

Section 948.025 of the Criminal Code of Wisconsin is violated by one who, within a specified period of time,[1] commits three or more sexual assaults of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three sexual assaults of (name of victim).

   In this case, the defendant is alleged to have committed sexual assault of a child by violating (identify the subsection of § 948.02 that defines the sexual assault alleged).[2]

   Section _____ requires the State to prove that:[3]

   LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

2. At least three sexual assaults took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).[5]

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

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[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three sexual assaults occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of (specify statute) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2107 was originally published in 1994 and revised in 1996, 2002, 2003, 2008, and 2018. This revision was approved by the Committee in February 2019; it updated the Comment.

This instruction is for a violation of § 948.025(1), which was created by 1993 Wisconsin Act 227 [effective date: April 23, 1994]. Act 227 provided that "[t]his act first applies to offenses committed on the effective date of this SECTION." 1993 Wisconsin Act 227, Section 44, Initial Applicability. Thus it appears that all of the acts must have occurred after April 23, 1994. The statute was amended by 2007 Wisconsin Act 80 [effective date: March 27, 2008].

NOTE: This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. [See Wis JI-Criminal 2107 EXAMPLE for a case where all predicates are violations of § 948.02(1)(b).] If the charge alleges violations of different subsections of § 948.02, considerable complexity could result and great care should be taken in drafting the instruction. Issues of concern include:

- slight variations in the elements of the predicate crimes, as with, for example, the age limits;
- determining whether less serious violations of § 948.025 are lesser included offenses – there is no special rule for § 948.025 in § 939.66, so the strict compare-the-statutory elements test would apply;
- submitting individual predicate offenses as lesser included offenses;
- making a proper statement regarding jury agreement – see § 948.025(2); and,
- potential confusion if evidence of other similar acts are submitted under § 904.04(2).

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The 2008 revision of Wis JI-Criminal 2107 reflected the penalty changes made by 2007 Wisconsin Act 80. There are five possible penalties for convictions under § 948.025:

- § 948.025(1)(a) requires at least three violations of § 948.02(1)(am) and is a Class A felony with a mandatory minimum of 25 years confinement before extended supervision eligibility – see § 939.616(1g).

- § 948.025(1)(b) requires at least three violations of § 948.02(1)(am), (b), or (c) and is a Class B felony with a mandatory minimum term of confinement of 25 years – see § 939.616(1r).

- § 948.025(1)(c) requires at least three violations of § 948.02(1)(am), (b), (c), or (d) and is a Class B felony with a mandatory minimum term of confinement of 5 years – see § 939.616(2).

- § 948.025(1)(d) requires at least three violations of § 948.02(1) and is a Class B felony with no mandatory minimum term of confinement.

- § 948.025(1)(e) requires at least three violations of § 948.02(1) or (2) and is a Class C felony with no mandatory minimum term of confinement.

Penalties and elements for offenses defined in § 948.02 are outlined in Wis JI-Criminal 2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 AND 2013 WISCONSIN ACT 167.

Section 939.635 provides that the maximum penalty for violations of § 948.025 "may be increased by not more than 5 years" if the offense was "against a child for whom the person was providing child care for compensation." See Wis JI-Criminal 2115 for a special question that should be added to the instruction when that penalty-increasing fact is charged.

State v. Colton M., 2015 WI App 94, 366 Wis.2d 119, 875 N.W.2d 642, concerned a claim by the 15-year-old defendant that applying § 948.025(1)(e) to him violated his due process and equal protection rights because statutes defined him as both a victim and an offender. The court concluded that "§ 948.025(1)(e), as applied to Colton, is not unconstitutionally vague beyond a reasonable doubt and, therefore, his delinquency adjudication under that statute does not violate his due process rights. We also conclude the prosecutor's decision to charge Colton and not D. [the underage victim] was not made on a discriminatory basis and, therefore, did not violate Colton's right to equal protection." 2015 WI App 94, ¶6.

Section 948.025(3) prohibits separate charges for sexual assaults that are predicates for the repeated sexual assault charge. See State v. Cooper, 2003 WI App 227, 267 Wis.2d 886, 672 N.W.2d 118. Separate charges for offenses that are not predicates for the repeated sexual assault charge are permissible. State v. Nommensen, 2007 WI App 224, 305 Wis.2d 695, 741 N.W.2d 481.

1. The statute refers to 3 or more violations "within a specified period of time." The Committee concluded that the intent of the statute must be that the prosecutor will specify the applicable period in the charge. That "specified period" should be carried over to the jury instruction. See note 5, below.

2. This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. Refer to the standard instruction for that subsection and insert it here, using the

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bullet points in place of numbers for each element. For an illustration, see Wis JI-Criminal 2107 EXAMPLE.

3. To avoid a second reference to "elements" in defining the predicate crimes, the Committee decided that a bulleted list should be used instead of a numerical one. The instruction introduces the list with ". . . requires the State to prove that: . ." to allow simply plugging in the regular statement of the element without change, using a bullet point instead of a number. See Wis JI-Criminal 2107 EXAMPLE.

4. The Committee recommends that a complete listing of the elements of the "predicate crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and the intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. Here identify the beginning and ending dates of the period specified by the prosecution. For example: "The specified period of time is from January 1, 2008 through June 16, 2008."

In State v. Schultz, 2019 WI App 3, 385 Wis.2d 494, 922 N.W.2d 866, the defendant was tried and acquitted on a charge of repeated sexual assault of child. The specified time period was identified as "late summer or early fall" of 2012. After the acquittal, he was charged with a single act of child sexual assault against the same victim alleged to have occurred on or about Oct. 19, 2012. This was based on a paternity test showing he was the father of a child conceived at that time. Schultz argued that principles of double jeopardy should bar the charge for child sexual assault. The issue for the court of appeals was whether Oct. 19 was included in the specified time period of "late summer or early fall."

The court concluded that "early fall" was ambiguous and that it was "appropriate to look at the entire record to clarify the meaning of the phrase ..." ¶25. The proper test "is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language." ¶30. The court concluded that the reasonable person "would not consider the phrase 'early fall of 2012' to include October 19." ¶34.

The court added:

> We thus emphasize an important point, lest our decision be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions: well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal – or, in the alternative, move to make more definite and certain the allegations against him or her – of charges based on allegedly overbroad or ambiguous timeframes in a charging document.
> ¶35.

[The Wisconsin Supreme Court granted review in Schultz on April 2, 2019.]

6. This statement is based on § 948.025(2). It is sufficient for cases where all the alleged predicate violations are of the same subsection of § 948.02. If the alleged predicate violations are of different subsections of § 948.02, a more detailed statement is required. See subs. (b) and (c) of § 948.025.

The rules in subsec. (2) of § 948.025 do "not violate due process or the right to a unanimous verdict." State v. Johnson, 2001 WI 52, ¶28, 243 Wis.2d 365, 627 N.W.2d 455.

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2107 EXAMPLE REPEATED ACTS OF SEXUAL ASSAULT OF A CHILD — § 948.025(1)(b)

Statutory Definition of the Crime

Section 948.025(1)(b) of the Criminal Code of Wisconsin is violated by one who, within a specified period of time, commits three or more sexual assaults of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three sexual assaults of (name of victim).

   In this case, the defendant is alleged to have committed sexual assault of a child by violating Section 948.02(1)(b).

   Section 948.02(1)(b) requires the State to prove that:

   - The defendant had sexual intercourse with (name of victim).
   - (Name of victim) was under the age of 12 years at the time of the alleged sexual intercourse.

     Knowledge of (name of victim)'s age is not required and mistake regarding (name of victim)'s age is not a defense.

     Consent to sexual intercourse is not a defense.

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Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

2. At least three sexual assaults took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three sexual assaults occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of § 948.02(1)(b) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2107 EXAMPLE was approved by the Committee in December 2008.

This instruction is drafted as an example of how Wis JI-Criminal 2107 would read when applied to a case where all the predicate offenses for a charge under § 948.025(1)(b) are violations of § 948.02(1)(b).

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2108 PHYSICAL ABUSE OF A CHILD: INTENTIONALLY CAUSING GREAT BODILY HARM — § 948.03(2)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(2)(a) of the Criminal Code of Wisconsin, is committed by one who intentionally causes great bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[1]

2. The defendant intentionally[2] caused great bodily harm.

   This requires that the defendant had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

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Knowledge of (name of victim) 's age by the defendant is not required[3] and mistake regarding (name of victim) 's age is not a defense.[4]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2108 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(2)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

The privilege of parental discipline as defined in § 939.45(5) is not available as a defense to a charge under § 948.03(2)(a). As amended by the same legislation that created § 948.03, § 939.45(5)(b) provides that "it is never reasonable discipline to use force which is intended to cause great bodily harm. . . ." Thus, by proving that the defendant intentionally caused great bodily harm, the state will also prove that the privilege does not apply. If evidence was received that might raise the issue of parental discipline, it might be helpful to the jury to instruct in the words quoted above that the privilege does not apply to the intentional causing of great bodily harm. If the lesser included offense of intentionally causing bodily harm is submitted, the privilege could apply to that offense. See Wis JI-Criminal 950.

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2108A PHYSICAL ABUSE OF A CHILD: FAILING TO ACT TO PREVENT GREAT BODILY HARM — § 948.03(4)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(4)(a) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has knowledge that another person intends to cause great bodily harm to the child, is physically and emotionally capable of taking action which will prevent the great bodily harm from occurring, fails to take that action, and whose failure to act facilitates the great bodily harm to the child that is intentionally caused by the other person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. First, that the defendant was a person responsible for the welfare of a child, (name of victim).

   A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[1]

2. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

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Knowledge of (name of victim) 's age by the defendant is not required[2] and mistake regarding (name of victim) 's age is not a defense.[3]

3. (Name of principal) intentionally[4] caused great bodily harm to (name of victim) .

This requires that (name of principal) had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[5]

4. The defendant knew or believed[6] that (name of principal) intended to cause[7] great bodily harm to (name of victim) .

What the defendant knew or believed must be determined from the standpoint of the defendant at the time of the alleged offense and not from the viewpoint of the jury now.[8]

5. The defendant was physically and emotionally capable of taking action which would have prevented the great bodily harm from occurring.[9]

6. The defendant failed to take that action.

7. The defendant's alleged failure to act facilitated the great bodily harm to (name of victim) that was intentionally caused by (name of principal) .[10]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 2108.1 in 1993. This revision renumbered the instruction and was approved by the Committee in December 2008; it involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse. Subsection (4), addressed by this instruction, imposes liability for failing to act to prevent great bodily harm.

This instruction is drafted for one type of liability defined by § 948.03(4)(a) — that where a person's failure to act facilitates great bodily harm intentionally caused by another person. The statute also prohibits exposing a child to an unreasonable risk of great bodily harm. That alternative is not covered by this instruction.

The Wisconsin Supreme Court has stated that "[t]he legislature deliberately enacted sec. 948.03(4) to penalize the conduct described in the Williquette decision." State v. Rundle, 176 Wis.2d 985, 999, 500 N.W.2d 916 (1993). The reference is to State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), where the Wisconsin Supreme Court held that a person could violate the prior child abuse statute (§ 940.201, 1985-86 Stats.) by failing to protect children from a risk of physical abuse by another. That statute required that the defendant "subject the child to cruel maltreatment," which the court found was established where the defendant mother was shown to have failed to act in the face of repeated abuse of her children by the children's father. The Williquette court also recognized that general omissions liability exists in Wisconsin, notwithstanding the fact that no specific statute exists. 129 Wis.2d 239, 251-55.

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Section 940.201 was repealed and replaced by § 948.03. 1987 Wisconsin Act 332. In Rundle, supra, the court held that the Williquette holding was codified in § 948.03(4). The court reversed Rundle's conviction for aiding and abetting a violation of § 948.03 because the evidence was not sufficient to prove "conduct, either verbal or overt, that as a matter of objective fact, aids another in the execution of a crime." 176 Wis.2d 985, 1004. The court held that omissions cannot be used to satisfy the "conduct" requirement of party to crime liability (at least for violations of § 948.03): "In sec. 948.03(4) the legislature has specified which omissions to act are unlawful." 176 Wis.2d 985, 1003.

1. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

2. Section 939.23(6).

3. Section 939.43(2).

4. This instruction is drafted for cases where great bodily harm is intentionally caused by another person. Section 948.03(4)(a) applies where the other person "intends to cause, is causing or has intentionally or recklessly caused great bodily harm." The Committee concluded that for the variety of conduct addressed by this instruction, the other person must have intentionally caused great bodily harm and the defendant must have known that the person intended to cause such harm.

5. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

6. The instruction uses "knew or believed" in place of the phrase "has knowledge that" which is used in the statute. No change in meaning is intended. See § 939.23(2).

7. See note 4, above.

8. Section 939.23(2).

9. Section 948.03(4)(a) also applies to preventing the harm from "being repeated." The Committee concluded that the "being repeated" alternative fits better with exposing the child to a risk of harm, which is not addressed by this instruction.

10. The instruction addresses the case where the defendant's failure to act is alleged to have facilitated great bodily harm caused by another. The statute also covers exposing the child to a risk of harm, which is not addressed by this instruction.

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2108B PHYSICAL ABUSE OF A CHILD: FAILING TO ACT TO PREVENT RECKLESS CAUSING OF GREAT BODILY HARM — § 948.03(4)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(4)(a) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has knowledge that another person has recklessly caused great bodily harm to the child, is physically and emotionally capable of taking action which will prevent the great bodily harm from occurring, fails to take that action, and whose failure to act facilitates the great bodily harm to the child that is recklessly caused by the other person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following seven elements were present.

Elements of the Crime That the State Must Prove

1. First, that the defendant was a person responsible for the welfare of a child, (name of victim).

   A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[1]

2. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

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Knowledge of (name of victim) 's age by the defendant is not required[2] and mistake regarding (name of victim) 's age is not a defense.[3]

3. (Name of principal) recklessly caused great bodily harm to (name of victim) .

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim) .[4]

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim) , you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim) .[5]

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[6]

4. The defendant knew or believed[7] that (name of principal) recklessly caused great bodily harm to (name of victim) .

What the defendant knew or believed must be determined from the standpoint of the defendant at the time of the alleged offense and not from the viewpoint of the jury now.[8]

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5. The defendant was physically and emotionally capable of taking action which would have prevented the great bodily harm from occurring.[9]

6. The defendant failed to take that action.

7. The defendant's alleged failure to act facilitated the great bodily harm to (name of victim) that was recklessly caused by (name of principal).[10]

Deciding About Knowledge and Belief

You cannot look into a person's mind to find knowledge and belief. Knowledge and belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all seven elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was approved by the Committee in March 2015.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse. Subsection (4), addressed by this instruction, imposes liability for failing to act to prevent great bodily harm.

This instruction is drafted for one type of liability defined by § 948.03(4)(a) — that where a person's failure to act facilitates great bodily harm recklessly caused by another person. See Wis JI-Criminal 2108A for offenses involving great bodily harm intentionally caused by another person. The statute also prohibits exposing a child to an unreasonable risk of great bodily harm. That alternative is not covered by this instruction.

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The Wisconsin Supreme Court has stated that "[t]he legislature deliberately enacted sec. 948.03(4) to penalize the conduct described in the Williquette decision." State v. Rundle, 176 Wis.2d 985, 999, 500 N.W.2d 916 (1993). The reference is to State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), where the Wisconsin Supreme Court held that a person could violate the prior child abuse statute (§ 940.201, 1985-86 Stats.) by failing to protect children from a risk of physical abuse by another. That statute required that the defendant "subject the child to cruel maltreatment," which the court found was established where the defendant mother was shown to have failed to act in the face of repeated abuse of her children by the children's father. The Williquette court also recognized that general omissions liability exists in Wisconsin, notwithstanding the fact that no specific statute exists. 129 Wis.2d 239, 251-55.

Section 940.201 was repealed and replaced by § 948.03. 1987 Wisconsin Act 332. In Rundle, supra, the court held that the Williquette holding was codified in § 948.03(4). The court reversed Rundle's conviction for aiding and abetting a violation of § 948.03 because the evidence was not sufficient to prove "conduct, either verbal or overt, that as a matter of objective fact, aids another in the execution of a crime." 176 Wis.2d 985, 1004. The court held that omissions cannot be used to satisfy the "conduct" requirement of party to crime liability (at least for violations of § 948.03): "In sec. 948.03(4) the legislature has specified which omissions to act are unlawful." 176 Wis.2d 985, 1003.

1. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

2. Section 939.23(6).

3. Section 939.43(2).

4. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,' because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did

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not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though"recklessly" is defined differently in § 948.03, the basic concept is the same — all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

6. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

7. The instruction uses "knew or believed" in place of the phrase "has knowledge that" which is used in the statute. No change in meaning is intended. See § 939.23(2).

8. Section 939.23(2).

9. Section 948.03(4)(a) also applies to preventing the harm from "being repeated." The Committee concluded that the "being repeated" alternative fits better with exposing the child to a risk of harm, which is not addressed by this instruction.

10. The instruction addresses the case where the defendant's failure to act is alleged to have facilitated great bodily harm caused by another. The statute also covers exposing the child to a risk of harm, which is not addressed by this instruction.

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2109 PHYSICAL ABUSE OF A CHILD: INTENTIONALLY CAUSING BODILY HARM — § 948.03(2)(b)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(2)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant intentionally[2] caused bodily harm.

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

   Knowledge of (name of victim)'s age by the defendant is not required[3] and mistake regarding (name of victim)'s age is not a defense.[4]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2109 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(2)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

See Wis JI-Criminal 950 for an instruction on the privilege of parental discipline.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

3. Section 939.23(6).

4. Section 939.43(2).

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2110 PHYSICAL ABUSE OF A CHILD: INTENTIONALLY CAUSING BODILY HARM BY CONDUCT WHICH CREATES A HIGH PROBABILITY OF GREAT BODILY HARM — § 948.03(2)(c)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(2)(c) of the Criminal Code of Wisconsin, is committed by one who intentionally causes bodily harm to a child by conduct which creates a high probability of great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant intentionally[2] caused bodily harm.

   This requires that the defendant had the mental purpose to cause bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

3. The defendant's conduct created a high probability of great bodily harm.

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"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[3]

4. The defendant knew that (his) (her) conduct created a high probability of great bodily harm.[4]

5. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[5] and mistake regarding (name of victim)'s age is not a defense.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2110 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(2)(c), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

See Wis JI-Criminal 950 regarding the applicability of the privilege of parental discipline to this offense.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and B.

3. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

4. Section 948.03(2)(c) applies to those who "intentionally cause bodily harm by conduct which creates a high probability of great bodily harm." Section 939.23(3) provides that when "intentionally" is used in a criminal statute, it requires that the actor "have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'." The Committee concluded that this requires that the defendant charged under § 948.03(2)(c) must have known that his conduct created a high probability of great bodily harm.

5. Section 939.23(6).

6. Section 939.43(2).

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2111 PHYSICAL ABUSE OF A CHILD: RECKLESSLY CAUSING GREAT BODILY HARM — § 948.03(3)(a)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(3)(a) of the Criminal Code of Wisconsin, is committed by one who recklessly causes great bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused great bodily harm to (name of victim).

   "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[1]

2. The defendant recklessly caused great bodily harm.

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[2]

   In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should

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consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[3]

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[4] and mistake regarding (name of victim)'s age is not a defense.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2111 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(3)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

1. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

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2. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,' because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

3. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though"recklessly" is defined differently in § 948.03, the basic concept is the same — all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

4. Section 939.23(6).

5. Section 939.43(2).

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2112 PHYSICAL ABUSE OF A CHILD: RECKLESSLY CAUSING BODILY HARM — § 948.03(3)(b)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(3)(b) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant recklessly caused bodily harm.

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[2]

   In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct

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was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[3]

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[4] and mistake regarding (name of victim)'s age is not a defense.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2112 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(3)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,' because only the latter includes a subjective component. We therefore conclude that recklessly causing harm

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to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

3. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though"recklessly" is defined differently in § 948.03, the basic concept is the same — all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

4. Section 939.23(6).

5. Section 939.43(2).

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2113 PHYSICAL ABUSE OF A CHILD: RECKLESSLY CAUSING BODILY HARM BY CONDUCT WHICH CREATES A HIGH PROBABILITY OF GREAT BODILY HARM — § 948.03(3)(c)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(3)(c) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

   Bodily harm means physical pain or injury, illness, or any impairment of physical condition.[1]

2. The defendant recklessly caused bodily harm.

   This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).[2]

   In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should

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consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).[3]

3. The defendant's conduct created a high probability of great bodily harm.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[4]

4. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required[5] and mistake regarding (name of victim)'s age is not a defense.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2113 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

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Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse.

This instruction is for a violation of § 948.03(3)(c), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,' because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

3. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 948.03, the basic concept is the same — all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

4. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

5. Section 939.23(6).

6. Section 939.43(2).

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2114 PHYSICAL ABUSE OR SEXUAL ASSAULT OF A CHILD BY A PERSON RESPONSIBLE FOR THE WELFARE OF THE CHILD — §§ 948.02(3m), 948.025(2m), and 948.03(5)

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

ADD THE FOLLOWING TO WIS JI-CRIMINAL 2102-2105, 2107, or 2108-2113:[1]

The information alleges not only that the defendant committed the crime of (name of offense)[2] of a child but also that the defendant was responsible for the welfare of the child who is alleged to be the victim of that crime.

If you find the defendant guilty, you must answer the following question:

"At the time of the (name of offense),[3] was the defendant responsible for the welfare of (name of victim)?"

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant was responsible for the welfare of (name of victim) at the time of the (name of offense).[4]

A "person responsible for the welfare of a child" includes _____.[5]

If you are satisfied beyond a reasonable doubt that the defendant was responsible for the welfare of (name of victim) at the time of the (name of offense),[6] you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

Wis JI-Criminal 2114 was originally published in 1990 and revised in 1995 and 1996. This revision was approved by the Committee in February 2003.

Sections 948.02(3m), 948.025(2m), and 948.03(5) were repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by §§ 948.02(3m), 948.025(2m), and 948.03(5) have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(6).

This instruction is drafted for use in cases involving any one of three provisions that enhance the penalty for offenses against children when those offenses are committed by a "person responsible for the welfare of the child." Each of the following statutes allows for increasing the maximum term of imprisonment by not more than 5 years: § 948.02(3m) for sexual assault of a child; § 948.025(2m) for repeated acts of sexual assault of a child; and § 948.03(5) for physical abuse of a child.

Sections 948.02(3m) and 948.025(2m) were created by 1995 Wisconsin Act 14 and apply to offenses committed on or after May 31, 1995.

The Committee has concluded that penalty enhancement provisions are best handled by submitting them to the jury as a special question. For other examples, see Wis JI-Criminal 990, 994, and 996. The following form is suggested for the guilty verdict:

> We, the jury, find the defendant guilty of physical abuse of a child, under Wis. Stat. § 948.03___, at the time and place charged in the information.
>
> If you find the defendant guilty, answer the following question "yes" or "no":
>
> "At the time of the physical abuse, was the defendant responsible for the welfare of (name of victim) ?"

1. The penalty enhancement provision found in § 948.02(3m) applies to offenses defined in § 948.02(1) and (2). Wis JI-Criminal 2102 and 2104 are the instructions for those offenses.

The penalty enhancement provision in § 948.025(2m) applies to the offense defined in § 948.025. See Wis JI-Criminal 2107.

Sections 948.02(3m) and 948.025(2m) were created by 1995 Wisconsin Act 14 and apply to offenses committed on or after May 31, 1995.

The penalty enhancement provision in § 948.03(5) applies to offenses defined in § 948.03(2) and (3). Wis JI-Criminal 2108, 2109, and 2110 are the instructions for the three types of intentional physical abuse defined in sub. (2). Wis JI-Criminal 2111, 2112, and 2113 are the instructions for the three types of reckless physical abuse defined in sub. (3).

2. Use the name of the offense: "sexual assault" if the case involves § 948.02(3m); "repeated acts of sexual assault" if the case involves § 948.025(2m); "physical abuse" if the case involves § 948.03(5).

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3. See note 2, supra.

4. See note 2, supra.

5. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; an employe of a public or private residential home, institution, or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child. [NOTE: "Stepparent" was added to the definition by 1995 Wisconsin Act 214 (effective date: May 1, 1996).]

The Committee concluded that the § 948.01(3) definition applies even though there is a slight difference in the wording of the phrase in § 948.03(5). Compare ". . . the person is responsible for the welfare of the child" in § 948.03(5) with "person responsible for the child's welfare" in § 948.01(3).

[NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).]

In State v. Sostre, 198 Wis.2d 409, N.W.2d (1996), the Wisconsin Supreme Court held that a live-in boyfriend, who is a volunteer caretaker of a child, is a "person . . . responsible for the welfare of [a] child" under § 948.01(3). The defendant had lived with the mother of the victim for about three years. During this time the defendant did everything the mother did with regard to taking care of the children, including feeding and bathing them. The child considered the defendant his father or stepfather, called him "Poppy," and had a father-son relationship with the defendant. The definition of "person responsible . . ." includes those who are "employed by one legally responsible for the child's welfare to exercise temporary control or care for the child." The court held:

> A common meaning of the word "employed" is to "engage the service of" or "to make use of." Under these facts, it seems clear that the mother made use of the services of the defendant, or engaged the services of the defendant, in order to take care of her child when it was necessary for her to be away. In other words, the defendant was clearly "employed" by a person "legally responsible" for a child to "care for that child."

The fact that the word "employed" is usually equated with economic payment for services does not require a different result. Nor does the fact that a person in this defendant's position may not qualify as a "person responsible" for purposes of the privilege of parental discipline defined in § 939.45(5). That definition does not include the phrase "employed by one legally responsible . . ." that was at issue in this case. [State v. Dodd, 185 Wis.2d 560, 518 N.W.2d 300 (Ct. App. 1994), held that a live-in boyfriend was not covered by the privilege.] The court concluded the legislature specifically and deliberately defined the same term differently in the two statutes.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21, Neglecting a Child. State v. Evans, 171 Wis.2d 471, 492 N.W.2d 141 (1992). The definition of "person responsible . . ." in § 948.01(3) applies to § 948.21 and to the offenses covered by this instruction.

6. See note 2, supra.

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2114A REPEATED ACTS OF PHYSICAL ABUSE OF A CHILD — § 948.03(5)

Statutory Definition of the Crime

Section 948.03(5) of the Criminal Code of Wisconsin is violated by one who, within a specified period of time,[1] commits three or more acts of physical abuse of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three acts of physical abuse of (name of victim).

   In this case, the defendant is alleged to have committed physical abuse of a child by violating (identify the subsection of § 948.03 that defines the physical abuse alleged).[2]

   Section _____ requires the State to prove that:[3]

   LIST THE ELEMENTS OF THE CRIME AS IDENTIFIED IN THE APPLICABLE INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[4]

2. At least three acts of physical abuse took place within a specified period of time.

   The specified period of time is from (beginning date of specified period) through (ending date of specified period).[5]

   GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

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[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three acts of physical abuse occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of (specify statute) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS A, B, C, OR D FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.[7]

[If you find the defendant guilty, you must answer the following question:

(Did at least one violation cause the death of the child? You must all agree on the violation that caused death.)

(Did at least two violations involve intentionally causing great bodily harm to the child? You must all agree on the violations that caused great bodily harm.)

(Did at least one violation cause great bodily harm to the child? You must all agree on the violation that caused[8] great bodily harm.)

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(Did at least one violation create a high probability of great bodily harm to the child?

You must all agree on the violation that created a high probability of great bodily harm.)

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 2114A was originally published in 2017. This revision was approved by the Committee in February 2019; it updated footnote 5.

This instruction is for a violation of § 948.03(5), which was created by 2015 Wisconsin Act 366 [effective date: April 21, 2016].

NOTE: This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.03. See Wis JI-Criminal 2114A EXAMPLE for a case where all predicates are violations of § 948.03(2)(a). If the charge alleges violations of different subsections of § 948.03, considerable complexity could result and great care should be taken in drafting the instruction. Issues of concern include:

- determining whether less serious violations of § 948.03(5) are lesser included offenses – there is no special rule for § 948.03(5) in § 939.66, so the strict compare-the-statutory elements test would apply;
- submitting individual predicate offenses as lesser included offenses;
- making a proper statement regarding jury agreement – see § 948.03(5)(b); and,
- potential confusion if evidence of other similar acts is submitted under § 904.04(2).

There are five possible penalties for convictions under § 948.03(5):

- § 948.03(5)(a)1. provides that it is a Class A felony "if at least one violation caused the death of the child."

- § 948.03(5)(a)2. provides that it is a Class B felony "if at least 2 violations were violations of sub. (2)(a)" – referring to intentionally causing great bodily harm to a child.

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- § 948.03(5)(a)3. provides that it is a Class C felony "if at least one violation resulted in great bodily harm to the child."

- § 948.03(5)(a)4. provides that it is a Class D felony "if at least one violation created a high probability of great bodily harm to the child."

- § 948.03(5)(a)5. states: "A Class E felony." The Committee concluded that this applies where none of the facts addressed by the other penalty provisions are alleged.

If the offense is charged as a Class E felony, nothing need be added to the text of the instruction. If the offense is charged as a Class A, B, C, or D felony, a special question should be added to assure a jury finding on the penalty-increasing fact. See footnote 7, below.

Section 939.635, as amended by 2015 Wisconsin Act 366, provides that the maximum penalty for violations of § 948.03(5)(a)1., 2., or 3. "may be increased by not more than 5 years" if the offense was "against a child for whom the person was providing child care for compensation." See Wis JI-Criminal 2115 for a special question that should be added to the instruction when that penalty-increasing fact is charged.

1. The statute refers to 3 or more violations "within a specified period of time." The Committee concluded that the intent of the statute must be that the prosecutor will specify the applicable period in the charge. That "specified period" should be carried over to the jury instruction. See note 5, below.

2. This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.03. Refer to the standard instruction for that subsection and insert it here, using bullet points in place of numbers for each element. For an illustration, see Wis JI-Criminal 2114A EXAMPLE.

3. To avoid a second reference to "elements" in defining the predicate crimes, the Committee decided that a bullet-point list should be used instead of a numerical one. The instruction introduces the list with ". . . requires the State to prove that: . ." to allow simply plugging in the regular statement of the element without change, using a bullet point instead of a number. See Wis JI-Criminal 2114A EXAMPLE.

4. The Committee recommends that a complete listing of the elements of the crime be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion in similar situations: bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698] and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. Here identify the beginning and ending dates of the period specified by the prosecution. For example: "The specified period of time is from July 1, 2016, through October 1, 2016."

Section 948.025 Engaging in repeated acts of sexual assault of the same child, also requires specifying the time period. In State v. Schultz, 2019 WI App 3, 385 Wis.2d 494, 922 N.W.2d 866, the defendant was tried and acquitted on a charge of repeated sexual assault of child. The specified time period was identified as "late summer or early fall" of 2012. After the acquittal, he was charged with a single act of child sexual assault against the same victim alleged to have occurred on or about Oct. 19, 2012. This was based on a paternity test showing he was the father of a child conceived at that time. Schultz argued that principles of

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double jeopardy should bar the charge for child sexual assault. The issue for the court of appeals was whether Oct. 19 was included in the specified time period of "late summer or early fall."

The court concluded that "early fall" was ambiguous and that it was "appropriate to look at the entire record to clarify the meaning of the phrase ..." ¶25. The proper test "is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language." ¶30. The court concluded that the reasonable person "would not consider the phrase 'early fall of 2012' to include October 19." ¶34.

The court added:

> We thus emphasize an important point, lest our decision be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions: well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal – or, in the alternative, move to make more definite and certain the allegations against him or her – of charges based on allegedly overbroad or ambiguous timeframes in a charging document.
> ¶35.

[The Wisconsin Supreme Court granted review in Schultz on April 2, 2019.]

6. This statement is based on § 948.03(5)(b).

7. The penalties for convictions under § 948.03(5) range from a Class A to a Class E felony – see the Comment preceding footnote 1, above. If the offense is charged as a Class E felony, nothing need be added to the text of the instruction. If the offense is charged as a Class A, B, C, or D felony, a special question should be added to assure a jury finding on the penalty-increasing fact. While the jury need not agree on which acts constitute the required three for conviction under § 948.03(5) if more than three acts were alleged, see § 948.03(5)(b), the Committee concluded that the jury must unanimously agree on the on the facts that increase the penalty. Those facts are the equivalent of elements of the Class A, B, C, or D felony.

If the facts may support submitting more than one question, the situation is essentially the same as one involving lesser included offenses. SM-6 Instructing On Lesser Included Offenses provides a review of the law relating to lesser included offenses, including the recommended way to instruct on the transition between greater and lesser offenses.

8. Section 948.03 (5)(a)3. uses "resulted in" rather than "caused." The instruction uses "cause;" Wisconsin case law holds that the two terms have the same meaning. See State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989) and State v. Wille, 2007 WI App 27, 299 Wis.2d 531, 798 N.W.2d 343.

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2114A EXAMPLE REPEATED ACTS OF PHYSICAL ABUSE OF A CHILD — § 948.03(5)

Statutory Definition of the Crime

Section 948.03(5) of the Criminal Code of Wisconsin is violated by one who, within a specified period of time, commits three or more acts of physical abuse of the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed at least three acts of physical abuse of (name of victim).

   In this case, the defendant is alleged to have committed physical abuse of a child by violating Section 948.03(2)(a).

   Section 948.03(2)(a) requires the State to prove that:

   - The defendant caused great bodily harm to (name of victim).

     "Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

   - The defendant intentionally caused great bodily harm.

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This requires that the defendant had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

- (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

Knowledge of (name of victim)'s age by the defendant is not required and mistake regarding (name of victim)'s age is not a defense.

2. At least three acts of physical abuse took place within a specified period of time.

The specified period of time is from (beginning date of specified period) through (ending date of specified period).

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three acts of physical abuse occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of Section 948.03(2)(a) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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SEE WIS JI-CRIMINAL 2114A IF SPECIAL QUESTIONS ON PENALTY-INCREASING FACTS ARE NECESSARY.[1]

COMMENT

Wis JI-Criminal 2114A EXAMPLE was approved by the Committee in August 2017.

This instruction is for a violation of § 948.03(5), which was created by 2015 Wisconsin Act 366 [effective date: April 21, 2016].

The instruction is drafted as an example of how Wis JI-Criminal 2114A would read when applied to a case where all the predicate offenses for the charge under § 948.03(5) are violations of § 948.03(2)(a) – intentionally causing great bodily harm to a child.

1. The instruction assumes that the case is charged as a Class B felony under § 948.03(5)(a)2.: "at least 2 violations were violations of sub. (2)(a)." If only three predicate offenses were alleged, a special question on penalty is not necessary – the jury returning a guilty verdict will have agreed that the same three acts in violation of § 948.03(2)(a) were proved. If more than three predicate acts were alleged, the jury will have been told that agreement is not required on which acts constituted the required three. However, for purposes of the penalty, the jurors must all agree that the same two acts "were violations of sub. (2)(a)." Wis JI-Criminal 2114A provides special questions for the penalty-increasing facts.

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2115 SEXUAL ASSAULT OR PHYSICAL ABUSE OF A CHILD BY A CHILD CARE PROVIDER — § 939.635

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED ON OR AFTER DECEMBER 9, 2011.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON OFFENSES CHARGED UNDER §§ 948.02, 948.025, 948.03(2) and (3), AND 948.03(5)(a)1., 2., 3., and 4.[1]

The information alleges not only that the defendant committed the crime of _____ but also that the defendant did so against a child for whom the defendant was providing child care for compensation.

If you find the defendant guilty, you must answer the following question:[2]

"Did the defendant commit the crime of _____ against a child for whom the defendant was providing child care for compensation?"[3]

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant committed the crime against a child for whom the defendant was providing child care for compensation.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2115 was approved by the Committee in August 2017. This revision was approved in December 2018; it updated the list of statutes to which it applies.

This instruction is drafted for the penalty enhancer found in § 939.635, which was created by 2011 Wisconsin Act 82 [effective date: December 9, 2011.] It allows an increase of not more than 5 years for violations of §§ 948.02, 948.025, 948.03(2) and (3), and 948.03(5)(a)1., 2., 3., and 4. if the defendant committed the crime against a child for whom the defendant was providing child care for compensation. The reference to offenses under § 948.03(5), Engaging In Repeated Acts Of Physical Abuse Of A Child, was added by 2015 Wisconsin Act 366 [effective date: April 21, 2016] to include the Class A, B, C, and

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D felony violations of that statute. The prosecutor's intention to seek the enhanced penalty authorized by § 939.635 should be disclosed by alleging in the charging document that the defendant committed the crime against a child for whom the defendant was providing child care for compensation. This instruction should be added to the instruction for the crime charged if the evidence would support a finding that the penalty-increasing facts are established.

Until repealed by 2001 Wisconsin Act 109 (TIS II), a set of penalty enhancers existed for violations of §§ 948.02, 948.025, and 948.03 committed by a "person responsible for the welfare of the child." See Wis JI-Criminal 2114. Act 109 eliminated many penalty enhancers in the view that penalties had increased for most offenses and the new maximums provided sufficient sentencing authority. Act 109 recast them as aggravating circumstances to be considered in imposing a bifurcated sentence. The enhancers formerly found in §§ 948.02, 948.025, and 948.03 were recognized as aggravating factors in § 973.017(6) AGGRAVATING FACTORS; CHILD SEXUAL ASSAULT OR CHILD ABUSE.

1. The relevant instructions are:

- for violations of §§ 948.02: JI 2102A through 2102E; JI 2104; JI 2105A and B; 2106, and 2107.
- for violations of § 948.03(2): JI 2107; JI 2108; and JI 2109.
- for violations of § 948.03(3): JI 2111; JI 2112; and JI 2113.
- for violations of § 948.03(5)(a)1., 2., 3., and 4.: JI 2114.

2. The Committee recommends that the penalty enhancing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant commit the crime of _____ against a child for whom the defendant was providing child care for compensation?"

3. Section 939.635 does not define "for compensation." The bill creating the statute originally specified that it applied only to persons licensed under certain statutes relating to providers of child care. [See 2011 Assembly Bill 102.] Senate Amendment 1 to AB 102 was adopted and changed the specific statutory references to the more general "child care for compensation."

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2116 CAUSING MENTAL HARM TO A CHILD — § 948.04

Statutory Definition of the Crime

Causing mental harm to a child, as defined in § 948.04 of the Criminal Code of Wisconsin, is committed by one who is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was exercising temporary or permanent control[1] of (name of victim).
2. (Name of victim) suffered mental harm.

   "Mental harm" means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child, including, but not limited to, anxiety, depression, withdrawal, or outward aggressive behavior. "Mental harm" may be demonstrated by a substantial and observable change in behavior, emotional response, or cognition that is not within the normal range for the child's age and stage of development.[2]
3. The defendant caused mental harm to (name of victim).

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This requires that the defendant's conduct was a substantial factor in producing the mental harm.[3]

4. The defendant caused mental harm by conduct which demonstrated substantial disregard for the mental well-being of (name of victim).[4]

5. (Name of victim) had not attained the age of 18 years at the time the alleged harm was caused.[5]

Knowledge of (name of victim)'s age by the defendant is not required[6] and mistake regarding (name of victim)'s age is not a defense.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2116 was originally published in 1989. This revision was approved by the Committee in December 2008 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.04, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

The offense defined by § 948.04 did not exist under prior law, at least to the extent that "cruel maltreatment" under § 940.201, 1985-86 Wis. Stats., did not include "mental harm" as defined for purposes of this offense.

1. "Exercising temporary or permanent control of a child" is not defined in Chapter 948. Compare the definition of "person responsible for the child's welfare" in § 948.01(3). There was nothing in the legislative history that indicated the intended scope of this term, so the Committee concluded that further definition in the instruction could not be provided with substantial assurance of accuracy.

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2. This is the definition provided in § 948.01(2). It is comparable to the definition of "emotional damage" in the statute requiring the reporting of child abuse or neglect. See § 48.981(1)(cm). The term "emotional damage" is also used in § 813.122 which provides for child abuse restraining orders and injunctions. The definition provided in § 813.122(1)(e) is similar to the one in § 948.01(2). The Wisconsin Court of Appeals applied the § 813.122(1)(e) definition in In The Interest of H.Q., 152 Wis.2d 701, 449 N.W.2d 75 (Ct. App. 1989), and found that "emotional damage" was not established by evidence showing that children were concerned or upset about their father's drunken behavior:

> That a child became upset and cried twice in six months because of a parent's acts and dislikes being with the parent is insufficient for a finding of emotional damage, in the absence of expert testimony.

152 Wis.2d 701, 709.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of mental harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. "Demonstrates substantial disregard for the mental well-being" appears to state a standard related to "recklessness." It is similar to the definition of recklessness used in § 948.03 — "demonstrates a conscious disregard for the safety of the child." The Wisconsin Court of Appeals has held that the § 948.03 definition states a different standard than the one provided by the definition of "criminal recklessness" in § 939.24 which requires a substantial and unreasonable risk and awareness of that risk. Those cases have made it clear that a subjective awareness of the risk is not required. See State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719 and State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393.

5. The crime is defined as causing mental harm "to a child," that is, to someone who has not attained the age of 18 years. Thus, the victim must have suffered mental harm before reaching the age of 18, even though the expanded statute of limitations would allow prosecution after the victim's 18th birthday. See § 939.74(2)(c).

6. Section 939.23(6).

7. Section 939.43(2).

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2119 FAILURE TO REPORT CHILD ABUSE — § 48.981(2), (3), and (6)

Statutory Definition of the Crime

Failure to report child abuse, as defined in § 48.981[1] of the Wisconsin Statutes, is committed by one who is required to report child abuse or neglect, has reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected, and intentionally fails to report as required.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was required to report child (abuse) (neglect).

   A _____ is required to report child (abuse) (neglect).[2]

2. The defendant saw (name of child) in the course of professional duties.

3. The defendant had reasonable cause to suspect that (name of child) had been (abused) (neglected).

   "Reasonable cause to suspect" means that a reasonable person in the defendant's position would have suspected that the child had been (abused) (neglected).[3]

   ["Abused" means physical injury inflicted by other than accidental means.][4]

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["Neglected" means failure, refusal, or inability on the part of a caregiver, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care, or shelter so as to seriously endanger the physical health of the child.][5]

4. The defendant intentionally failed to report.

"Intentionally," as used here, means that the defendant purposely failed to report. This does not require that the defendant knew that the law required the reporting of suspected (abuse) (neglect).[6]

"Report" requires immediately informing, by telephone or personally, the county department of (social) (human) services, or the sheriff, or the city police department of the facts and circumstances contributing to the reasonable suspicion that (abuse) (neglect) has occurred.[7]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2119 was originally published as Wis JI-Criminal 1221C in 1987. It was renumbered Wis JI-Criminal 2119 and republished without substantive change in 1992. The 2002 revision adopted a new format, made nonsubstantive changes to the text, and updated the Comment. This revision was approved by the Committee in December 2011; it updated the text and the Comment.

The offense defined by the combination of subsections (2), (3), and (6) of § 48.981 (see note 1, below) can be committed in two different situations: where a person has "reasonable cause to suspect" that a child has been abused or neglected; and where a person has "reason to believe" that a child has been threatened with abuse or neglect and that abuse or neglect will occur. Wis JI-Criminal 2119 is drafted for the first situation: reasonable cause to suspect that a child has been abused or neglected.

Section 48.981 was amended by 1987 Wisconsin Act 27 (the Budget Bill) to create an exception to the reporting requirement for "health care providers." The exception apparently excuses health care providers from the reporting requirement with regard to instances of consensual sexual contact and sexual intercourse with persons other than relatives, guardians, etc. The statutory changes are complex; see § 48.981(2m).

Subsection (2r) of § 48.981 recognizes an exception for persons delegated care and custody of a child under § 48.979.

1. The facts necessary to constitute the crime of failure to report child abuse or neglect are derived from subs. (2), (3), and (6) of § 48.981. Subsection (6) is the penalty section, providing that "whoever intentionally violates this section by failure to report as required" may be fined not more than $1,000 or imprisoned not more than 6 months or both. Those who are required to report are identified in sub. (2). Subsection (2m) provides an exception to the reporting requirement for "health care providers." Subsection (2r) of § 48.981 recognizes an exception for persons delegated care and custody of a child under § 48.979. Subsection (3) describes the nature of the required report.

2. The Committee suggests inserting the title of required reporters from the list provided in § 48.981(2) that allegedly applies to the defendant. For example: "A nurse is required to report child (abuse) (neglect)." It is for the jury to determine whether the defendant is in fact a person required to report.

Note that an exception to the reporting requirement is provided in § 48.981(2m) for "health care providers" in connection with some cases of sexual contact or sexual intercourse.

2011 Wisconsin Act 81 added to the list of required reporters by creating subsec. (2)(a)(16m) to read: "A school employee not otherwise specified in this paragraph."

3. The definition is adapted from the discussion in State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42 (Ct. App. 1986), where the constitutionality of the standard was upheld. The statute actually phrases the test in two different ways: "reasonable cause to suspect" that a child has been abused or neglected and "having reason to believe" that a child has been threatened with abuse or neglect and that abuse or neglect will occur. The instruction would have to be modified if the case involved the "threatened with abuse" option.

In Hurd, the court held that "the test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed

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by the defendant. Under this statute, conviction is only permitted when, under the totality of the circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse." 135 Wis.2d 266, 273.

4. The definition of "abused" is based on the alternative provided in § 48.02(1)(a). Nine other types of harm are also defined as "abuse" by § 48.02(1). "Physical injury" is further defined in § 48.02(14g).

5. The definition of "neglect" is based on the one provided in § 48.02(12g).

6. In State v. Hurd, note 3, supra, the court of appeals interpreted § 48.981 in its previous version when it used the word "wilfully." The court said "wilfully" means the same thing as "intentionally" under § 939.23(3). Section 48.981 was amended by 1985 Wis. Act. 29, sec. 926, to substitute "intentionally" for "wilfully." So it is fair to assume that what the Hurd court said about the "wilfully" version of the statute also applies to the present statute.

The Committee believes that "intentionally" failing to report requires an actual suspicion of child abuse (see element three) and an intentional (that is, purposeful) failure to report (element four). The statute is "intended to hold accountable those persons who reasonably suspect child abuse and intentionally fail to notify the appropriate agencies." State v. Hurd, 135 Wis.2d 266, 278. Knowledge of the statutory duty itself is not required. See § 939.23(3) and (5) and State v. Hurd, 135 Wis.2d 266, 277.

7. The definition of "report" is based on the description of the reporting requirement provided in § 48.981(3)(a)(1), which refers to "the county department." Section 48.02(2g) provides: "'County department' means a county department under s. 46.22 or 46.23, unless the context requires otherwise." Section 46.22 refers to the county department of social services; section 46.23 refers to the county department of human services.

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2120 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1)(a)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(a) of the Criminal Code of Wisconsin, is committed by one who employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording[2] or displaying in any way the conduct, with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (name of child) to engage in sexually explicit conduct.[4]

   [Consent by (name of child) is not a defense.][5]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][6]

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3. The defendant acted for the purpose of (recording) (displaying in any way) the sexually explicit conduct.

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][7]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[8]

Meaning of "Sexually Explicit Conduct"

"Sexually explicit conduct" means[9] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

Had the defendant attained the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

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If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2120 was approved by the Committee in June 2010.

NOTE: The instruction previously designated as Wis JI-Criminal 2120 was renumbered Wis JI-Criminal 2121 in 2010.

This instruction is for violations of sub. (1)(a) of § 948.05 where there is no evidence of the affirmative defense defined in sub. (3). Section 948.05 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. The act recreated what was sub. (1)(c) as new sub. (1m); see Wis JI-Criminal 2122. Act 3 also amended the affirmative defense provided in sub. (3), which can apply to violations addressed by this instruction. For cases involving the affirmative defense, see Wis JI-Criminal 2120A.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. Wis JI-Criminal 2120A provides instruction for violations of § 948.05(1)(a) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child.

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(a) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

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5. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2120A.

7. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the recording was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

10. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

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11. 2005 Wisconsin Act 433 [effective date: June 6, 2006] changed the penalty structure for violations of sec. 948.05: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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2120A SEXUAL EXPLOITATION OF A CHILD: AFFIRMATIVE DEFENSE — § 948.05(1)(a)

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(a) of the Criminal Code of Wisconsin, is committed by one who employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording[2] or displaying in any way the conduct, with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (name of child) to engage in sexually explicit conduct.[4]

   [Consent by (name of child) is not a defense.][5]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][6]

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3. The defendant acted for the purpose of (recording) (displaying in any way) the sexually explicit conduct.

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][7]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[8]

"Sexually explicit conduct" means[9] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[10]

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[11]

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

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If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[12]

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[13]

If you find the defendant guilty, you must answer the following question:

Had the defendant attained the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question"no."

COMMENT

Wis JI-Criminal 2120A was approved by the Committee in June 2010.

NOTE: The instruction previously designated as Wis JI-Criminal 2120A was renumbered JI 2121A in 2010.

This instruction is for a case involving a violation of sub. (1)(a) of § 948.05 where there is evidence of the affirmative defense defined in sub. (3) of the same statute. See Wis JI-Criminal 2120 for an instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

The definition of the affirmative defense in § 948.05(3) was amended by 1999 Wisconsin Act 3; effective date: May 13, 1999. The defense was limited to violations of subs. (1)(a), (1)(b), and (2) and requirements that the defendant's reasonable belief be supported by some sort of documentary proof of age exhibited by the child were deleted. The defense now requires only that "the defendant had reasonable cause to believe that the child had attained the age of 18 years."

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The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations § 948.05.

1. Wis JI-Criminal 2120A provides instruction for violations of § 948.05(1)(a) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(a) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2120A.

7. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the recording was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

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9. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

10. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

11. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

12. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

13. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2121 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1)(b)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(b) of the Criminal Code of Wisconsin, is committed by one who records[2] or displays in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (recorded) (displayed in any way) (name of child) .[4]

   "Record" means to reproduce an image or a sound or to store data representing an image or a sound.[5]

   [Consent by (name of child) is not a defense.][6]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child) 's age is not required and mistake regarding (name of child) 's age is not a defense.][7]

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3. The defendant (recorded) (displayed in any way) (name of child) while (name of child) was engaged in sexually explicit conduct.

"Sexually explicit conduct" means[8] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[9]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

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COMMENT

This instruction was originally published as Wis JI-Criminal 2120 in 1995 and revised in 2000, 2001, 2003, 2004, and 2007. This revision renumbered the instruction as Wis JI-Criminal 2121 and was approved by the Committee in June 2010.

This instruction is for violations of sub. (1)(b) of § 948.05 where there is no evidence of the affirmative defense defined in sub. (3). Section 948.05 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. The act recreated what was sub. (1)(c) as new sub. (1m); see Wis JI-Criminal 2122. Act 3 also amended the affirmative defense provided in sub. (3), which can apply to violations addressed by this instruction. For cases involving the affirmative defense, see Wis JI-Criminal 2121A.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. Wis JI-Criminal 2121A provides instruction for violations of § 948.05(1)(b) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child.

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(b) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

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6. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

7. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2121A.

8. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

9. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

10. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

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11. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2121A SEXUAL EXPLOITATION OF A CHILD: AFFIRMATIVE DEFENSE — § 948.05(1)(b)

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(b) of the Criminal Code of Wisconsin, is committed by one who records[2] or displays in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (recorded) (displayed in any way) (name of child) .[4]

   "Record" means to reproduce an image or a sound or to store data representing an image or a sound.[5]

   [Consent by (name of child) is not a defense.][6]

2. (Name of child) had not attained the age of 18 years.

3. The defendant (recorded) (displayed in any way) (name of child) while (name of child) was engaged in sexually explicit conduct.

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"Sexually explicit conduct" means[7] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate parts)).[8]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[9]

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[10]

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

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If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[11]

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[12]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2120A in 2000 and revised in 2001, 2003, 2004, 2007, and 2008. This revision renumbered the instruction Wis JI-Criminal 2121A and was approved by the Committee in June 2010.

This instruction is for a case involving a violation of sub. (1)(b) of § 948.05 where there is evidence of the defense provided in sub. (3) of the same statute. See Wis JI-Criminal 2121 for an instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

The definition of the affirmative defense in § 948.05(3) was amended by 1999 Wisconsin Act 3; effective date: May 13, 1999. The defense was limited to violations of subs. (1)(a), (1)(b), and (2) and requirements that the defendant's reasonable belief be supported by some sort of documentary proof of age exhibited by the child were deleted. The defense now requires only that "the defendant had reasonable cause to believe that the child had attained the age of 18 years."

The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. This instruction is intended to be used for cases involving violations of § 948.05(1)(b) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant "had reasonable cause to believe that the child had attained the age of 18 years." The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(b) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

7. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:

(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;

(b) Bestiality;

(c) Masturbation;

(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or

(e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved

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reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

9. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the child in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

10. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

11. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

12. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2122 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1m)

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1m) of the Criminal Code of Wisconsin, is committed by one who distributes[1] any recording[2] of a child engaged in sexually explicit conduct, knows the character and content of the sexually explicit conduct involving the child and knows or reasonably should know that the child engaged in the sexually explicit conduct has not attained the age of 18 years.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant distributed a recording of [a child] [(name of child)][4] engaged in sexually explicit conduct.

   "Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

   "Sexually explicit conduct" means[6] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate parts)).[7]

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2. The defendant knew that [the person] [(name of child)] in the recording was engaged in sexually explicit conduct.[8]

   [Consent by (name of child) is not a defense.][9]

3. [The person] [(Name of child)] had not attained the age of 18 years.

4. The defendant knew or reasonably should have known that [the person] [(name of child)] had not attained the age of 18 years.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2122 was originally published in 2000 and revised in 2001, 2003 and 2004. This revision was approved by the Committee in February 2007; it involved adding a special question at the end of the instruction and updating the Comment.

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This instruction is for a violation of sub. (1m) of § 948.05, which was created as sub. (1)(c) by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

The statute was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. That amendment renumbered sub. (1)(c) as sub. (1m) and added a mental element relating to the child's age. The latter change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999). See note 10, below.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1)(a) or (b) or (1m).

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. "Distributes" refers to just one of the activities proscribed by § 948.05(1m) and was selected for use in the instruction because it appears to be an alternative likely to be used. The other alternatives are: produces; performs in; profits from; promotes; imports into the state; reproduces; advertises; sells; or, possesses with intent to sell or distribute. For cases involving one of those alternatives, the applicable term would, of course, have to be substituted for "distributes" throughout the instruction.

2. This reflects the change made in § 948.05(1m) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to "any undeveloped film, photographic negative, motion picture, videotape, sound recording, or other reproduction . . ."

3. The requirement that the defendant knew or reasonably should have known the age of the child was added to the statute by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370, (1999). See note 10, below.

4. One of the alternatives should be selected: using the name of the child if known, or just referring to "a child" if the name of the child is not known.

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

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(7) "Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

7. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the child in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

10. The knowledge element was extended to the age of the child by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999) [reversing 215 Wis.2d 71, 572 N.W.2d 491 (Ct. App. 1997)]. The defendant in Zarnke was charged with distributing pictures of children engaged in sexually explicit conduct in violation of sub. (1)(c) of § 948.05, 1997-98 Wis. Stats. In rejecting Zarnke's constitutional challenges to the statute, the court of appeals interpreted it to require the state to prove the defendant's knowledge of the child being under age. The court concluded that the legislature did not intend to treat the knowledge issue as an affirmative defense "where the illegal conduct occurs outside of the child's presence." 215 Wis.2d 71, 82-83.

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The supreme court held that sub. (1)(c) of § 948.05 was "unconstitutional as it applies to the distribution of sexually explicit material depicting minors, as well as to the other prohibited conduct which does not entail a personal interaction between the accused and the child-victim." 224 Wis.2d 116, 124. The defect is the statute's "failing to require that the State prove that a distributor of sexually explicit materials had knowledge of the minority of person(s) depicted in the materials." 224 Wis.2d 116, 120-21. Act 3 renumbered sub. (1)(c) to sub. (1m) and revised it to include an element requiring that the defendant knew, or reasonably should have known, the age of the child. It also revised the affirmative defense provision in § 948.05(3) so that it does not apply to violations of sub. (1m).

11. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1m), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2123 SEXUAL EXPLOITATION OF A CHILD: BY A PERSON RESPONSIBLE FOR THE CHILD'S WELFARE — § 948.05(2)

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(2) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who knowingly permits, allows, or encourages the child to engage in sexually explicit conduct for the purpose of recording[1] or displaying it in any way.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person responsible for the welfare of a child, (name of victim).

   A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[2]

2. The defendant knowingly permitted, allowed, or encouraged (name of victim) to engage in sexually explicit conduct.

   "Sexually explicit conduct" means[3] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[4]

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3. The defendant intended that the sexually explicit conduct be recorded or displayed in any way.[5]

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][6]

4. (Name of child) had not attained the age of 18 years.[7]

[Knowledge of (name of child) 's age is not required and mistake regarding (name of child) 's age is not a defense.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2123 was approved by the Committee in June 2007.

This instruction is for violations of sub. (2) of § 948.05 which applies only to "a person responsible for a child's welfare." Violations of sub. (1)(b) are addressed by Wis JI-Criminal 2120 and 2120A; violations of sub. (1m) are addressed by Wis JI-Criminal 2122.

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Subsection (3) of § 948.05 provides that it is an affirmative defense if a defendant "has reasonable cause to believe that the child ha d attained the age of 18 years." It may be unlikely that the defense would apply to violations of sub. (2), where the defendant must be a person responsible for the child's welfare. If the defense does apply, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).

1. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

2. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

A biological father, who has admitted paternity in writing, is a "parent" and thus a "person responsible for the child's welfare" under § 948.21. State v. Evans, 171 Wis.2d 471, 391 N.W.2d 141 (1992).

See the Comment to Wis JI-Criminal 2114 for discussion of case law interpreting this term.

3. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

4. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

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In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

5. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

The statute requires that the defendant "knowingly permit, allow or encourage the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1)(a) or(b) or (1m) . . ." In the Committee's judgment, the "purpose proscribed" in the cross-referenced sections boil down to "recording or displaying" sexually explicit conduct. The element uses the more direct requirement that the defendant "intend" that the conduct be recorded or displayed as the equivalent of permitting, allowing or encouraging for that purpose. No change of meaning is intended.

6. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

7. See s. 948.01(1).

8. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).

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2124 TRAFFICKING OF A CHILD — § 948.051(1)

Statutory Definition of the Crime

Trafficking of a child, as defined in § 948.051 of the Criminal Code of Wisconsin, is committed by one who knowingly [(recruits) (entices) (provides) (obtains) (harbors) (transports) (patronizes) (solicits)] [attempts to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] any child for the purpose of commercial sex acts.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly [(recruited) (enticed) (provided) (obtained) (harbored) (transported) (patronized) (solicited)] [attempted to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] (name of child).

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][1]

3. The defendant (use the term selected in element 1.) (name of child) for the purpose of commercial sex acts.[2]

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"Commercial sex act" means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.[3]

[Meaning of Sexual Contact]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT"]

Deciding About Knowledge and Purpose

You cannot look into a person's mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2124 was originally published in 2011 and was revised in 2015. This revision was approved by the Committee in July 2016; it reflects changes made by 2015 Wisconsin Act 367.

This instruction is drafted for violations of § 948.051, Trafficking of a child, which was created by 2007 Wisconsin Act 116 [effective date: April 3, 2008]. The statute was amended by 2013 Wisconsin Act 362 [effective date April 25, 2014]. See footnotes 2 and 3. 2015 Wisconsin Act 367 amended the statute to add "transport" "patronize" and "solicit" to the list of prohibited acts. [Effective date: May 29, 2017.]

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2007 Wisconsin Act 116 also created § 940.302, Human trafficking, – see Wis JI-Criminal 1276.

Subsection (2) of § 948.051 provides: "Whoever benefits in any manner from a violation of sub. (1) is guilty of a Class C felony if the person knows that the benefits come from an act described in sub. (1)." This instruction does not address this means of violating the statute.

2007 Wisconsin Act 116 also created § 939.46(1m) which provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

1. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

2. 2013 Wisconsin Act 362 amended § 948.051(1) to eliminate a reference to "sexually explicit performance." The same conduct is now covered by the term "commercial sex act" as specified as prohibited conduct in § 940.302(1)(a), which applies to violations of § 948.051.

3. This is the definition provided in § 940.302(1)(a) as amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. Section 948.051(1) specifically refers to this definition. For a definition of "sexual contact" see Wis JI-Criminal 934 and § 939.22(34). The Committee concluded that the definition in § 939.22(34) applies to the offense because § 948.051(1) specifically refers to trafficking "any child for the purpose of commercial sex acts, as defined in s. 940.302(1)(a) . . ." The definition in § 940.302(1)(a) refers to "sexual contact" and, since that statute is not part of § 940.225 or in Chapter 948, the definition of "sexual contact" in § 939.22(34) applies.

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2125 CAUSING A CHILD TO VIEW OR LISTEN TO SEXUAL ACTIVITY — § 948.055

Statutory Definition of the Crime

Section 948.055 of the Criminal Code of Wisconsin is violated by a person who intentionally causes [a child] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct for the purpose of sexually arousing or gratifying the person or humiliating or degrading the child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age][1] to view or listen to sexually explicit conduct.

   "Sexually explicit conduct"[2] means actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[3]

   Consent by [(name of child)] [the individual] is not a defense.

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2. The defendant intentionally caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct.

"Intentionally" requires that the defendant acted with the purpose to cause [(name of child)] [the individual] to view or listen to sexually explicit conduct.[4]

[SELECT THE THIRD ELEMENT THAT FITS THE FACTS OF THE CASE.]

[3. (Name of child) had not attained the age of (13) (18) years.[5]

Knowledge of (name of child) 's age is not required and mistake regarding (name of child) 's age is not a defense.[6]]

[3. The defendant believed or had reason to believe that the individual had not attained the age of (13) (18) years.[7]]

4. The defendant acted with the purpose of sexually arousing or gratifying the defendant or humiliating or degrading [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age].

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2125 was originally published in 1996 and was revised in 2004. This revision was approved by the Committee in October 2012; it revised the instruction to reflect changes made by 2011 Wisconsin Act 284.

Section 948.055 was originally enacted as § 940.227 by 1987 Wisconsin Act 334. It was renumbered § 948.055 by 1993 Wisconsin Act 218 and amended by 1995 Wisconsin Act 67.

The 1995 amendment made three changes in the text of § 948.055:

1) deleted the requirement that the defendant act "by use or threat of force or violence," replacing it with "intentionally";

2) added "or listen to"; and,

3) added "if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child."

The statute was amended by 2011 Wisconsin Act 284 [effective date: April 27, 2012] to extend its coverage to situations where "the actor believes or has reason to believe [the individual] has not attained 18 years of age." Act 284 also created § 939.32(1)(cr) to read: "Whoever attempts to commit a crime under s. 948.055(1) is subject to the penalty for the completed act, as provided in s. 948.055(2)."

Violations of § 948.055 are punished as a Class F felony if the child has not attained the age of 13 years [or if the defendant believes or has reason to believe the person has not attained the age of 13 years] and as a Class H felony if the child has not attained the age of 18 years [or if the defendant believes or has reason to believe the person has not attained the age of 18 years]. See § 948.055(2). The Committee recommends inserting the appropriate age limit as part of the third element.

1. 2011 Wisconsin Act 284 amended § 948.055 to apply to causing "an individual who the actor believes or has reason to believe has not attained 18 years of age" to view or listen to sexually explicit conduct, in addition to causing a child to do the same. This is apparently intended to address the "internet sting" situation, where the actor believes he or she is communicating with a child but the supposed child is in fact a government investigator. For cases involving this situation, the Committee recommends using the entire phrase "an individual who the actor believes or has reason to believe has not attained 18 years of age" where the name of the child would otherwise be used.

2. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7).

3. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in § 948.01(7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

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"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being."

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats. [recreated as § 948.05]. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area. . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

4. The instruction uses the common "mental purpose" definition of intent. Intent is also present where a defendant "is practically certain that his or her conduct" will have the prohibited result. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

5. Violations of this statute are punished as a Class F felony if the child has not attained the age of 13 years and as a Class H felony if the child has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

7. This is the alternative added to the statute by 2011 Wisconsin Act 284. Violations of this statute are punished as a Class F felony if the defendant believes or has reason to believe the individual has not attained the age of 13 years and as a Class H felony if the defendant believes or has reason to believe the individual has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.

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2130 INCEST WITH A CHILD: SEXUAL INTERCOURSE OR CONTACT — § 948.06(1)

Statutory Definition of the Crime

Incest with a child, as defined in §948.06(1) of the Criminal Code of Wisconsin, is committed by one who has sexual [intercourse] [contact] with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than second cousin.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [intercourse] [contact] with (name of victim).
2. The defendant knew that (name of victim) was related to (him) (her) by blood or adoption.[1]
3. (Name of victim) was related to the defendant in a degree of kinship closer than second cousin.[2]
4. (Name of victim) was under the age of 18 years at the time of the alleged offense.[3]

   Knowledge of (name of victim)'s age is not required[4] and mistake regarding (name of victim)'s age is not a defense.[5]

   Consent to sexual [contact] [intercourse] is not a defense.[6]

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Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2130 was originally published in 1974 and revised in 1980, 1991, 1994, and 1996. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text. This revision also combined the instructions formerly published as Wis JI-Criminal 2130 [incest involving sexual intercourse] and Wis JI-Criminal 2131 [incest involving sexual contact].

This instruction is for a violation of § 948.06(1), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. Note that § 944.06 also defines a crime of incest which is not limited to child victims. See Wis JI-Criminal 1510.

Section 948.06(1) also applies to one who marries a child. And sub. (2) imposes liability on a person responsible for a child's welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. Neither of those offenses are addressed by uniform instructions.

Section 948.06 was amended by 2005 Wisconsin Act 277 to create sub. (1m) which prohibits sexual contact or intercourse by a child's stepparent. See Wis JI-Criminal 2131.

1. The knowledge requirement is included in the statutory definition of the offense. Note that the knowledge required is that the defendant and the victim are "related." The statute further requires that they be related "in a degree closer than second cousin," but the knowledge requirement apparently does not extend to the degree of relation.

2. "Second cousin" is defined in Black's Law Dictionary (7th Edition) as follows: "A person related to another by descending from the same great-grandfather or great-grandmother." The table following footnote 6 shows the degree of relationship of second cousins.

3. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

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4. Section 939.23(6).

5. Section 939.43(2).

6. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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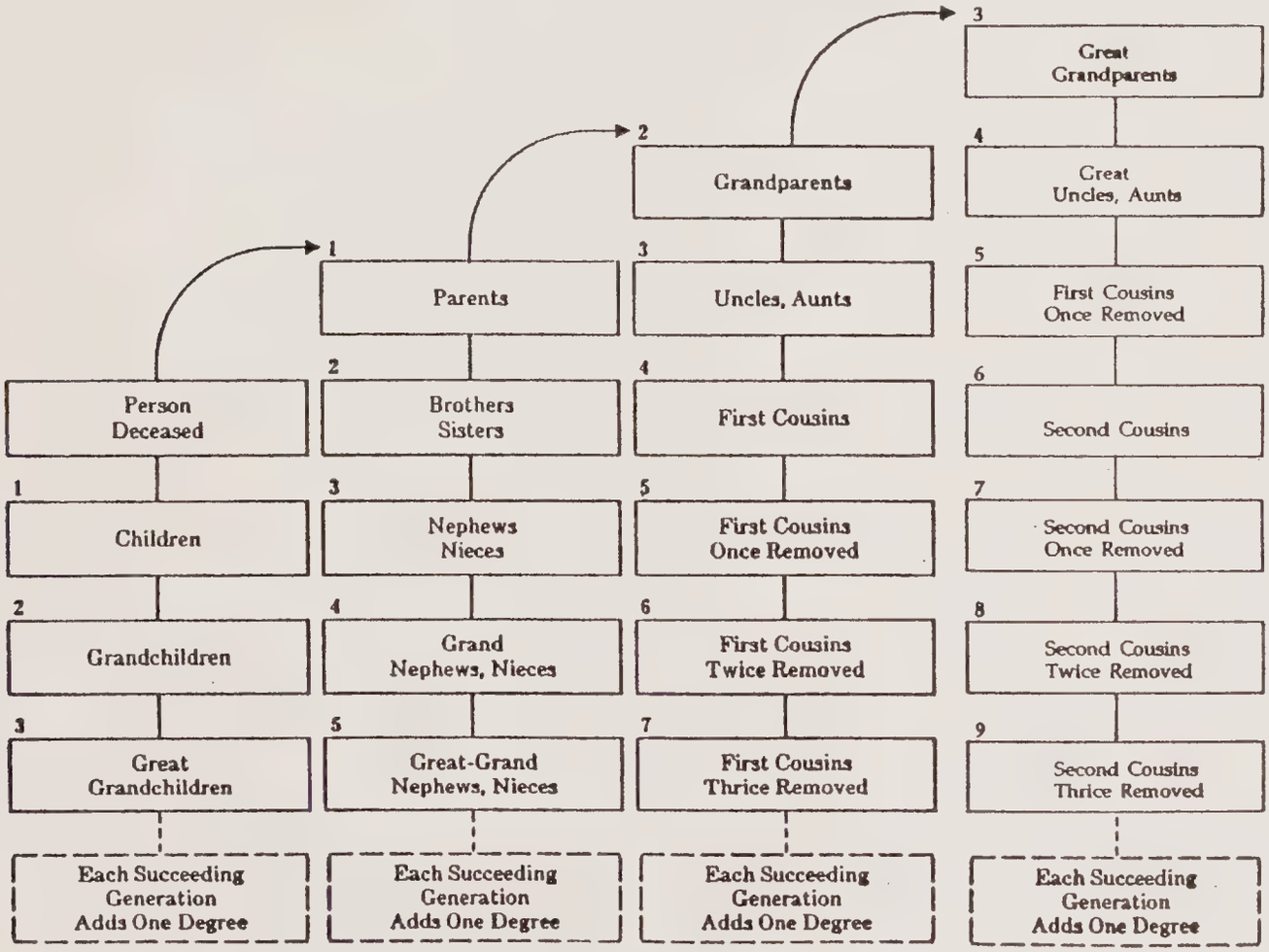
Degree of Kinship

The following chart is based on the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes. The column at the far right has been added to show how the various degrees of kinship compare to second cousins. The added column is based on the chart appearing at page 48, Decedents' Estates and Trusts, by Ritchie, Alford, and Effland, 4th Edition, © 1971, Foundation Press. Note that the degree of kinship of second cousins is indicated by the number "6." Thus, all those degrees indicated by the number "5" or less are "related in a degree closer than second cousin" and fall within the prohibition of s. 948.096(1).



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2131 INCEST WITH A CHILD: SEXUAL INTERCOURSE OR CONTACT BY STEPPARENT — § 948.06(1m)

Statutory Definition of the Crime

Incest with a child, as defined in §948.06(1m) of the Criminal Code of Wisconsin, is committed by one who has sexual [intercourse] [contact] with a child and who is the child's stepparent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [intercourse] [contact] with (name of victim).

2. The defendant was the stepparent of (name of victim).

   USE THE FOLLOWING IF IT IS BELIEVED TO BE NECESSARY TO DEFINE "STEPPARENT"

   "Stepparent" means a person who was married to the biological or adoptive parent of (name of child) at the time of the alleged offense.[1]

3. (Name of victim) was under the age of 18 years at the time of the alleged offense.[2]

   Knowledge of (name of victim)'s age is not required[3] and mistake regarding (name of victim)'s age is not a defense.[4]

   Consent to sexual [contact] [intercourse] is not a defense.[5]

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Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2131 was approved by the Committee in March 2007.

An instruction formerly published as Wis JI-Criminal 2131 [incest involving sexual contact] was combined with Wis JI-Criminal 2130 in 2007.

This instruction is for a violation of § 948.06(1m), created by 2005 Wisconsin Act 277 [effective date: April 20, 2006].

See Wis JI-Criminal 2130 for violations of §948.06(1). Subsection (2) of 948.06 imposes liability on a person responsible for a child's welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. That offense is not addressed by uniform instructions.

1. There is no statutory definition of "stepparent." The definition suggested in the text was developed by the Committee.

2. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

3. Section 939.23(6).

4. Section 939.43(2).

5. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2134 CHILD ENTICEMENT: COMPLETED ACT — § 948.07

Statutory Definition of the Crime

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who with intent to _____[1] causes any child who has not attained the age of 18 years[2] to go into any vehicle, building, room, or secluded place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused[3] (name of victim) to go into a (vehicle) (building) (room) (secluded place).[4]

2. The defendant caused (name of victim) to go into a (vehicle) (building) (room) (secluded place) with intent to _____.[5]

   The phrase "with intent to" means that the defendant must have had the mental purpose[6] to _____.[7]

3. (Name of victim) was under the age of 18 years.[8]

   Knowledge of (name of victim)'s age by the defendant is not required[9] and mistake regarding (name of victim)'s age is not a defense.[10]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2134 was originally published in 1989 and revised in 1994, 1997, 1998, 2000, 2003, 2006, 2011, 2014, and 2016. This revision was approved by the Committee in June 2018; it added to footnote 5.

This instruction is drafted for charges based on a completed act of enticement. For charges based on an attempt, see Wis JI-Criminal 2134A and 2134B.

This instruction is for a violation of § 948.07, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1530 (© 1983) which applied to an offense with the same name as defined in former § 944.12, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332. The primary changes in the definition of the offense are explained in notes 1 and 4, below. One other change is to delete "the provision under current law limiting the applicability of the child enticement statute to offenders 18 years of age or over. Thus, any person can be charged with and convicted of enticing a child, even if the offender is also a child. Consequently, an offender who is a child would be treated as a juvenile offender, as is done with other crimes committed by minors." Note to § 948.07, 1987 Senate Bill 203 (enacted as 1987 Wisconsin Act 332).

In State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833, the Wisconsin Supreme Court held that § 948.07 prohibits the act of enticement, with any one of six prohibited intents. Jury unanimity on which intent is present is not required and multiple charges of child enticement are not proper where based on a single act of enticement done with more than one of the prohibited intents. On the latter point, also see State v. Church, 223 Wis.2d 641, 589 N.W.2d 638 (Ct. App. 1998). [Review dismissed as improvidently granted because the issue was resolved in Derango, State v. Church, 2000 WI 90.]

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In Derango, supra, the court also held that charges of child enticement and attempted sexual exploitation of a child may be based on a single phone call. 2000 WI 89, ¶¶26-36.

In State v. Hanson, 182 Wis.2d 481, 513 N.W.2d 700 (Ct. App. 1994), the defendant argued that his conviction under § 948.07(3) was unconstitutional. He claimed that it was irrational to consider enticement to commit an act of indecent exposure, a Class C felony, [note: now a Class BC felony] to be so much more serious than the completed act of exposure itself, a Class A misdemeanor. The court rejected the argument, holding that a rational basis exists for the legislative scheme: "enticement of a child is a social evil in and of itself regardless of the specific sexual motive which causes the defendant to act." 182 Wis.2d 481, 487.

In State v. Gomez, 179 Wis.2d 400, 507 N.W.2d 378 (Ct. App. 1993), the court affirmed a conviction under § 948.07. The court held that the statute unambiguously applies to causing the child to enter any room, including the child's own bedroom. The court also found the evidence sufficient to establish intent to expose a sex organ to the child at the time the defendant told her to go to her bedroom.

In State v. Provo, 2004 WI App 97, ¶12, 272 Wis.2d 837, 681 N.W.2d 272, the court that prior cases had recognized "that the gravamen of the child enticement statute is to prevent children from being taken into places outside of the protection of the public where the commission of some illegal conduct might be facilitated . . . No language says that the place from which the child was taken had to be a public place."

1. In this blank, insert a statement identifying one or more of the prohibited acts specified in § 948.07(1)-(6):

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.

(2) Causing the child to engage in prostitution.

(3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.

(4) Recording the child engaging in sexually explicit conduct.

(5) Causing bodily or mental harm to the child.

(6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer to "recording." Recording is defined in § 948.01(3r).

Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6) have

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identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. When the second element of this offense is explained, all the aspects of the underlying conduct should be identified. See note 4, below.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

> [This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The age reference should be changed to "has not attained the age of 16 years" if the case involves a charge of enticement with intent to have sexual contact or sexual intercourse in violation of § 948.02. See subsec. (1) of § 948.07. Section 948.02 defines offenses against children who have not attained the age of 16 years.

3. Section 948.07 uses "causes or attempts to cause" in place of "persuades or entices" found in former § 944.12. The Note to 1987 Senate Bill 203 (enacted as 1987 Wisconsin Act 332) explained the change as follows:

> Note: This Section:
>
> 1. Deletes the words "persuades or entices" contained in the current child enticement statute [s. 944.12] and, instead, characterizes the crime of child enticement as "causing or attempting to cause" a child to go into any vehicle, building, room or secluded place with the intent to commit a criminal act or acts. The substitution of "causes" for "persuades or entices," eliminates as an element of the crime the state of mind of the child being enticed. The language "attempts to cause" is added to further clarify that the crime of child enticement includes the attempted act of enticement, consistent with s. 939.32(1)(d), as created by this bill.

Charges of child enticement based on "attempts to cause" are addressed by Wis JI-Criminal 2134A and 2134B.

4. The instruction has never included a definition of "secluded place." In State v. Pask, 2010 WI App 53, 324 Wis.2d 555, 781 N.W.2d 751, the court addressed the meaning of the term. Pask was convicted of enticing a child in violation of § 948.07 based on attempting to lure a 9-year old girl into a park shelter area for the purpose of having sexual contact. The court of appeals concluded that the park shelter qualifies as a "secluded place":

> . . . when there is evidence that a defendant has an intention to take a child to a place that is partially screened or hidden from view, a jury may find that it is with the purpose to take the child away from public safety. Indeed, any place that removes the child from the public's protection to a place less likely to be detected by the public could suffice as being a "secluded place." ¶1.

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The instruction has never defined "secluded place." The trial judge in this case instructed that "secluded place means a place screened or hidden from view or remote from others." The court of appeals noted that this promoted a more limited definition of "secluded place" than the statute requires and therefore "inured to Pask's benefit."

5. Here identify the conduct specified in subsecs. (1) to (6) of § 948.07. Care should be taken to provide a complete description of what the conduct requires, including definition of terms where necessary. The Committee suggests the following:

Under subsec. (1), for violations based on § 948.02:

". . . have sexual intercourse with (name of victim). Sexual intercourse means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required."

or

". . . have sexual contact with (name of victim). Sexual contact is an intentional touching by the defendant of an intimate part of another, done for the purpose of (sexual arousal or gratification) (sexually degrading or humiliating that person)."

See Wis JI-Criminal 2101B for discussion of the definition of sexual intercourse. See Wis JI-Criminal 2101A for discussion of the definition of sexual contact. Note that for violations of subsection (1), the victim must be under the age of 16 years. See note 2, supra.

Under subsec. (1), for violations based on § 948.085(1):

". . . have sexual (contact) (intercourse) in violation of § 948.085(1). Section 948.085(1) is violated by a person who has sexual [contact] [intercourse] with a child for whom the person is a (foster parent) (treatment foster parent).

Under subsec. (1), for violations based on § 948.085(2):

". . . have sexual (contact) (intercourse) in violation of § 948.085(2). Section 948.085(2) is violated by a person who has sexual [contact] [intercourse] with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible for managing the facility).

Under subsec. (1), for violations based on § 948.095(2):

". . . have sexual (contact) (intercourse) in violation of § 948.095(2). Section 948.095(2) is violated by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student."
[See Wis JI-Criminal 2139 for a complete description of the offense defined in § 948.095(2).]

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Under subsec. (1), for violations based on § 948.095(3):

". . . have sexual (contact) (intercourse) in violation of § 948.095(3). Section 948.095(3) is violated by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

Under subsec. (2):

". . . cause (name of victim) to engage in an act that, if engaged in between adults, would be an act of prostitution. An act of prostitution is an act of sexual intercourse or sexual contact engaged in for something of value."

Under subsec. (3):

". . . expose genitals, pubic area, or intimate parts to (name of victim) for the purpose of sexual arousal or gratification."

See Wis JI-Criminal 2140 and 2141 for descriptions of two offenses defined by § 948.10.

Under subsec. (4):

". . . recording (name of victim) engaging in sexually explicit conduct. Sexually explicit conduct means actual or simulated (see § 948.01(7))."

The appropriate part of the definition of "sexually explicit conduct" provided in § 948.01(7) should be included.

Under subsec. (5):

". . . cause bodily harm to (name of victim) . Bodily harm means physical pain or injury, illness, or any impairment of physical condition."

The definition of "bodily harm" is from § 939.22(4).

A violation involving subsec. (5) may also be based on intent to cause mental harm, a term defined in § 948.01(2).

Under subsec. (6):

". . . give or sell a controlled substance to (name of victim) ."

Subsection (6) refers to giving or selling a controlled substance or controlled substance analog "in violation of Chapter 961." It is unclear what that reference adds, since any delivery to a child would appear to be in violation of Chapter 961.

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In any case, the facts may require elaborating on the brief statements suggested above. The key is to assure that the jury is told of all the aspects of the underlying conduct that the defendant must intend to perform to make the enticement a violation of § 948.07.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

6. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

7. Add the same statement used at note 5, supra.

8. See note 2, supra.

9. Section 939.23(6).

10. Section 939.43(2).

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2134A CHILD ENTICEMENT: ATTEMPT: ACTUAL CHILD — § 948.07

Statutory Definition of the Crime

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who with intent to _____[1] attempts to cause any child who has not attained the age of 18 years[2] to go into any vehicle, building, room, or secluded place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to cause[3] (name of victim) to go into a (vehicle) (building) (room) (secluded place).

2. The defendant attempted to cause (name of victim) to go into a (vehicle) (building) (room) (secluded place) with intent to _____.[4]

   The phrase "with intent to" means that the defendant must have had the mental purpose[5] to _____.[6]

3. (Name of victim) was under the age of 18 years.[7]

   Knowledge of (name of victim)'s age by the defendant is not required[8] and mistake regarding (name of victim)'s age is not a defense.[9]

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Definition of Attempt

Attempt requires that the defendant intended to cause (name of victim) to go into a (vehicle) (building) (room) (secluded place) for the purpose of _____[10] and that the defendant did acts which demonstrate unequivocally, under all of the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.[11]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2134A was originally published in 2003 and revised in 2007 and 2015. This revision was approved by the Committee in June 2018; it added to footnote 4.

Section 948.07 prohibits "causing or attempting to cause" a child to go into designated places for one of several prohibited purposes. Thus, it punishes the completed crime and the attempt equally. This instruction is drafted for the enticement case based on an attempt to entice an actual child. A separate instruction is provided for enticement cases based on an attempt to entice what turns out to be a fictitious child. See Wis JI-Criminal 2134B.

When an enticement charge is based on an attempt, it incorporates attempt as defined in § 939.32. State v. Koenck, 2001 WI App 93, ¶20, 242 Wis.2d 693, 626 N.W.2d 359; State v. Robins, 2002 WI 65, ¶28, 253 Wis.2d 298, 646 N.W.2d 287. This instruction incorporates the definition of attempt provided in § 939.32 as interpreted by Wis JI-Criminal 580.

See the Comment to Wis JI-Criminal 2134 for a general discussion of § 948.07 and the crime of child enticement.

1. In this blank, insert a statement identifying one or more of the prohibited acts specified in § 948.07(1)-(6):

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.

(2) Causing the child to engage in prostitution.

(3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.

(4) Recording the child engaging in sexually explicit conduct.

(5) Causing bodily or mental harm to the child.

(6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

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Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer to "recording." Recording is defined in § 948.01(3r).

Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6) have identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. When the second element of this offense is explained, all the aspects of the underlying conduct should be identified. See note 4, below.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

> [This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The age reference should be changed to "has not attained the age of 16 years" if the case involves a charge of enticement with intent to have sexual contact or sexual intercourse in violation of § 948.02. See subsec. (1) of § 948.07. Section 948.02 defines offenses against children who have not attained the age of 16 years.

3. Section 948.07 uses "causes or attempts to cause" in place of "persuades or entices" found in former § 944.12. The Note to 1987 Senate Bill 203 (enacted as 1987 Wisconsin Act 332) explained the change as follows:

> Note: This Section:
>
> 1. Deletes the words "persuades or entices" contained in the current child enticement statute [s. 944.12] and, instead, characterizes the crime of child enticement as "causing or attempting to cause" a child to go into any vehicle, building, room or secluded place with the intent to commit a criminal act or acts. The substitution of "causes" for "persuades or entices," eliminates as an element of the crime the state of mind of the child being enticed. The language "attempts to cause" is added to further clarify that the crime of child enticement includes the attempted act of enticement, consistent with s. 939.32(1)(d), as created by this bill.

This instruction is drafted for enticements based on attempt to entice an actual child. For enticements based on attempt to entice a fictitious child, see Wis JI-Criminal 2134B. For enticements based on completed acts, see Wis JI-Criminal 2134.

4. Here identify the conduct specified in subsecs. (1) to (6) of § 948.07. Care should be taken to provide a complete description of what the conduct requires, including definition of terms where necessary. The Committee suggests the following:

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Under subsec. (1), for violations based on § 948.02:

". . . have sexual intercourse with (name of victim). Sexual intercourse means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required."

or

". . . have sexual contact with (name of victim). Sexual contact is an intentional touching by the defendant of an intimate part of another, done for the purpose of (sexual arousal or gratification) (sexually degrading or humiliating that person)."

See Wis JI-Criminal 2101B for discussion of the definition of sexual intercourse. See Wis JI-Criminal 2101A for discussion of the definition of sexual contact. Note that for violations of subsection (1), the victim must be under the age of 16 years. See note 2, supra.

Under subsec. (1), for violations based on § 948.085(1):

". . . have sexual (contact) (intercourse) in violation of § 948.085(1). Section 948.085(1) is violated by a person who has sexual [contact] [intercourse] with a child for whom the person is a (foster parent) (treatment foster parent).

Under subsec. (1), for violations based on § 948.085(2):

". . . have sexual (contact) (intercourse) in violation of § 948.085(2). Section 948.085(2) is violated by a person who has sexual [contact] [intercourse] with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible for managing the facility).

Under subsec. (1), for violations based on § 948.095(2):

". . . have sexual (contact) (intercourse) in violation of § 948.095(2). Section 948.095(2) is violated by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the chile is enrolled as a student."
[See Wis JI-Criminal 2139 for a complete description of the offense defined in § 948.095(2).]

Under subsec. (1), for violations based on § 948.095(3):

". . . have sexual (contact) (intercourse) in violation of § 948.095(3). Section 948.095(3) is violated by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

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Under subsec. (2):

". . . engage in an act with (name of victim), that, if engaged in between adults, would be an act of prostitution. An act of prostitution is an act of sexual intercourse or sexual contact engaged in for something of value."

Under subsec. (3):

". . . expose genitals, pubic area, or intimate parts to (name of victim) for the purpose of sexual arousal or gratification."

See Wis JI-Criminal 2140 and 2141 for descriptions of two offenses defined by § 948.10.

Under subsec. (4):

". . . recording (name of victim) engaging in sexually explicit conduct. Sexually explicit conduct means actual or simulated (see § 948.01(7))."

The appropriate part of the definition of "sexually explicit conduct" provided in § 948.01(7) should be included.

Under subsec. (5):

". . . cause bodily harm to (name of victim). Bodily harm means physical pain or injury, illness, or any impairment of physical condition."

The definition of "bodily harm" is from § 939.22(4).

A violation involving subsec. (5) may also be based on intent to cause mental harm, a term defined in § 948.01(2).

Under subsec. (6):

". . . give or sell a controlled substance to (name of victim)."

Subsection (6) refers to giving or selling a controlled substance or controlled substance analog "in violation of Chapter 961." It is unclear what that reference adds, since any delivery to a child would appear to be in violation of Chapter 961.

In any case, the facts may require elaborating on the brief statements suggested above. The key is to assure that the jury is told of all the aspects of the underlying conduct that the defendant must intend to perform to make the enticement a violation of § 948.07.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the

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crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

5. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

6. Use the same statement used at note 4, supra.

7. See note 2, supra.

8. Section 939.23(6).

9. Section 939.43(2).

10. Use same statement used at note 4, supra.

11. The definition of attempt is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

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2134B CHILD ENTICEMENT: ATTEMPT: FICTITIOUS CHILD — § 948.07

Statutory Definition of the Crime

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual contact with a child,[1] attempts to cause a person (he) (she) believed to be a child who has not attained the age of 16 years[2] to go into any vehicle, building, room, or secluded place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to cause a person to go into a (vehicle) (building) (room) (secluded place).
2. The defendant attempted to cause a person to go into a (vehicle) (building) (room) (secluded place) with intent to have sexual contact.

   The phrase "with intent to" means that the defendant must have had the mental purpose[3] to engage in sexual contact.
3. The defendant believed that the person was under the age of 16 years.[4]

Definition of Attempt

Attempt requires that the defendant intended to cause a person the defendant believed to be a child who was under 16 years of age[5] to go into a (vehicle) (building) (room)

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(secluded place) for the purpose of having sexual contact and that the defendant did acts which demonstrate unequivocally, under all of the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.[6]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual contact with that person.[7]

Meaning of Sexual Contact

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2134B was originally published in 2003 and revised in 2007, 2014, and 2016. This revision was approved by the Committee in June 2018; it added to footnote 2.

Section 948.07 prohibits "causing or attempting to cause" a child to go into designated places for one of several prohibited purposes. Thus, it punishes the completed crime and the attempt equally. This instruction is drafted for the enticement case based on an attempt to entice what turns out to be a fictitious child. A separate instruction is provided for enticement cases based on an attempt to entice an actual child. See Wis JI-Criminal 2134A.

When an enticement charge is based on an attempt, it incorporates attempt as defined in § 939.32. State v. Koenck, 2001 WI App 93, ¶20, 242 Wis.2d 693, 626 N.W.2d 359; State v. Robins, 2002 WI 65, ¶28, 253 Wis.2d 298, 646 N.W.2d 287. This instruction incorporates the definition of attempt provided in § 939.32 as interpreted by Wis JI-Criminal 580.

In State v. Robins, 2002 WI 65, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

> . . . attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, where the court of appeals reached the same conclusion: "the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that

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prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact." 2001 WI App 93, ¶28.

Both Robins and Koenck stop short of expressly holding that the defendant must believe that the person with whom he or she is dealing is a child. The Committee concluded that the statement in Robins that the fact that the victim is a fictitious child must be "unbeknownst" to the defendant is the equivalent of requiring that the defendant believe the victim is a child. This requirement is reflected in the instruction's definition of attempt.

The court of appeals interpreted Robins and Koenck in this manner in State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Grimm held that "the state may properly charge attempted child enticement . . . when the intended victim is actually an adult whom the defendant believes to be a child." ¶2.

Robins also rejected claims that applying § 948.07 based on communications over the internet violated the First Amendment:

> The child enticement statute regulates conduct, not speech. . . That an act of child enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny. 2002 WI 65, ¶43.

See the Comment to Wis JI-Criminal 2134 for a general discussion of § 948.07 and the crime of child enticement.

1. This instruction is drafted for a case involving intent to have sexual contact with a child. Other types of prohibited conduct are specified in § 948.07(1)-(6):

> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.
>
> (2) Causing the child to engage in prostitution.
>
> (3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.
>
> (4) Recording the child engaging in sexually explicit conduct.
>
> (5) Causing bodily or mental harm to the child.
>
> (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer to "recording." Recording is defined in § 948.01(3r).

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Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6) have identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. See footnote 4, Wis JI-Criminal 2134A for suggested summaries of the elements of the other predicate crimes.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

> [This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The instruction is drafted for a case alleged to involve intent to have "sexual contact with a child under § 948.02," as prohibited in § 948.07(1). Sexual contact [or sexual intercourse] with a child in violation of § 948.02 requires that the victim be under the age of 16 years. The other prohibited conduct specified in subs. (2) through (6) of § 948.07 apply when the victim is under the age of 18 years.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

3. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

4. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact with a child in violation of § 948.02, for which this instruction is drafted, the victim must be under the age of 16, so the defendant's belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287:

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"attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 2002 WI 65, ¶34.

The court of appeals interpreted Robins and Koenck in this manner in State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Grimm held that "the state may properly charge attempted child enticement . . . when the intended victim is actually an adult whom the defendant believes to be a child." ¶2.

5. See note 4, supra.

6. The definition of attempt is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

7. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, that "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious." 2002 WI 65, ¶34.

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2135 USE OF A COMPUTER TO FACILITATE A CHILD SEX CRIME — § 948.075

Statutory Definition of the Crime

Section 948.075 is violated by a person who uses a computerized communication system to communicate with an individual who the person believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (four) (five)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a computerized communication system[3] to communicate with an individual.
2. The defendant believed or had reason to believe that the individual was under the age of 16 years.
3. The defendant used a computerized communication system to communicate with the individual with intent to have sexual (contact) (intercourse) with the individual.
4. The defendant did an act, in addition to using a computerized communication system, to carry out the intent to have sexual (contact) (intercourse).[4]

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ADD THE FOLLOWING AS A FIFTH ELEMENT IF SUPPORTED BY THE EVIDENCE[5]

[5. At the time of the communication, the defendant did not reasonably believe that the age of the individual to whom the communication was sent was no more than 24 months less than the age of the defendant.][6]

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

Deciding About Intent and Belief

You cannot look into a person's mind to find intent and belief. Intent and belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (four) (five) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2135 was originally published in 2003 and revised in 2007, 2009 and 2013. The 2009 revision updated footnote 4 and the 2013 revision updated the Comment. This revision was approved by the Committee in July 2016; it added to the Comment and to footnote 3.

This instruction is for violations of § 948.075, which was created by 2001 Wisconsin Act 109 [effective date: July 30, 2002.]

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2011 Wisconsin Act 284 [effective date: April 27, 2012] created § 939.32(1)(de), which provides: "Whoever attempts to commit a crime under s. 948.075(1r) is subject to the penalty provided in that section for the completed act."

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. As amended by 2011 Wisconsin Act 272, it provides for a minimum sentence of 5 years for violations of § 948.075. In State v. Heidke, 2016 WI App 55, 370 Wis.2d 771, 883 N.W.2d 162, the court of appeals addressed the constitutionality of § 939.617. Heidke argued that the mandatory penalty was irrational and unconstitutional because it doesn't apply to the completed sex crimes that he allegedly intended to facilitate by his computer use. The court of appeals rejected the claim, finding that the legislature had a rational basis for the distinction.

Conduct that may violate § 948.075 may also constitute enticement of a child under § 948.07 or attempted sexual assault of a child. See State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287; State v. Koenck, 2002 WI App 93, 242 Wis.2d 693, 626 N.W.2d 359; and, State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Also see, Wis JI-Criminal 2134B Child Enticement: Attempt: Fictitious Child.

1. The statutory definition of the crime refers to "sexual contact or sexual intercourse in violation of s. 948.02(1) or (2)." The reference to the statute numbers was not included in the instruction because the Committee concluded that it was not necessary. Any sexual contact or sexual intercourse with a person under the age of 16 is a violation of § 948.02(1) or (2).

2. The instruction will contain five elements if there is evidence of the defense recognized in sub. (2) of § 948.75. See note 5, below.

3. "Computerized communication system" is not defined in § 948.075. Section 943.70, Computer crimes, provides definitions of "computer" and "computer system." See § 943.70(1)(am) and (e).

In State v. McKellips, 2016 WI 51, 369 Wis.2d 437, 881 N.W.2d 258, the trial court may have followed these references in adding the following to the standard instruction:

> Evidence has been received that the defendant communicated with a child under the age of 16 via a mobile or cellphone. You must determine whether the phone described in the evidence constitutes a computerized communication system. To aid you in that determination, you are instructed that under Wisconsin law, a computer is defined as — computer is defined as computer, which means an electronic device that performs logical, arithmetic, and memory functions by manipulating electronic or magnetic impulses, and includes all input, output, processing, storage, computer software and communication facilities that are connected or related to a computer in a computer system or computer network. Computer system is defined as a set of related computer equipment, hardware, or software.

The Wisconsin Supreme Court found that this instruction, "while not perfect," accurately stated the law. The court also provided its own definition, based on the plain meaning of the terms used: "A group of interacting, interrelated, or interdependent elements forming a complex whole used to exchange thoughts or messages through a computer." 2016 WI 51, ¶34.

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4. This element is intended to reflect sub. (3) of § 948.075, which provides:

> Proof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actor's intent under sub. (1) shall be necessary to prove that intent.

The instruction departs from the statutory language in two respects: it uses "in addition to" in place of the statute's "other than"; and, it uses "to carry out" in place of the statute's "to effect." Both changes are intended to make the instruction clearer for the jury; no substantive change is intended. The conclusion that "carry out" has the same meaning as "effect" was cited with apparent approval in State v. Olson, 2008 WI App 171, 314 Wis.2d 630, 762 N.W.2d 393 at footnote 6.

In State v. Schulpius, 2006 WI App 263, 298 Wis.2d 155, 726 N.W.2d 706, the court found the evidence sufficient to prove that the defendant did something "other than use a computerized communication system to communicate with" the person he believed to be a fourteen-year old girl. The defendant drove through the victim's neighborhood for the purpose of meeting her and purchased condoms, which he referred to in his computer communication.

In State v. Olson, 2008 WI App 171, 314 Wis.2d 630, 762 N.W.2d 393, the court found there was not sufficient evidence to satisfy the "act" requirement. The defendant's use of a webcam to transmit video of himself was nothing more than using his computer to communicate. The court noted, however, that in other situations, "it may be possible to use a communication function of a computer to engage in an 'act' within the meaning of the statute." 2008 WI App 171, ¶16.

5. The fifth element should be added if there is evidence of the defense recognized by § 948.075(2). That subsection provides:

> This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.

The Committee concluded that this provision should be handled like other statutory exceptions: when the evidence supports the exception, the state must prove that the exception does not apply. For example, this is the way the exception for peace officers is handled with regard to charges of carrying a concealed weapon. See Wis JI-Criminal 1335 and State v. Williamson, 58 Wis.2d 514, 206 N.W.2d 613 (1973).

6. This statement takes the statement of the exception in sub. (2) and phrases it so the state has to prove the exception does not apply.

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2136 SOLICITING A CHILD FOR PROSTITUTION — § 948.08

Statutory Definition of the Crime

Soliciting a child for prostitution, as defined in § 948.08 of the Criminal Code of Wisconsin, is committed by one who intentionally solicits any child to engage in an act of prostitution.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant solicited (name of victim) to engage in an act of prostitution.

   "To solicit" means to command, encourage, or request another person to engage in specific conduct that constitutes an act of prostitution.[2]

   "An act of prostitution" means engaging in [sexual intercourse][3] [(specify act that would constitute prostitution under § 944.30)][4] for anything of value.

2. The defendant solicited (name of victim) intending that an act of prostitution be committed.

3. (Name of victim) had not attained the age of 18 years at the time of the alleged offense.

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Knowledge of (name of victim) 's age by the defendant is not required[5] and mistake regarding (name of victim) 's age is not a defense.[6]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2136 was originally published in 1989 and revised in 1986. This revision was approved by the Committee in December 2008. It updated the text to reflect changes made by 2007 Wisconsin Act 80 and adopted a new format.

This instruction is for a violation of § 948.08, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.08 replaced § 944.32, Soliciting Prostitutes, for offenses involving children. Soliciting a person under the age of 18 years was specified as a fact that increased the penalty under that statute. Section 944.32 is retained but amended to provide that it applies "except as provided under s. 948.08." See Wis JI-Criminal 1566 for violations of § 944.32.

Section 948.08 was amended by 2007 Wisconsin Act 80 to refer to "engage in an act of prostitution" in place of "to practice prostitution." [Effective date: March 27, 2008.] "To practice prostitution" was interpreted to require engaging in acts of prostitution on an ongoing basis. See State v. Johnson, 108 Wis.2d 703, 324 N.W.2d 447 (Ct. App. 1982), interpreting § 944.32.

1. Section 948.08 refers to "solicits or causes any child to engage in an act of prostitution or establishes any child in a place of prostitution." The instruction is drafted for what is believed to be the most common offense — soliciting a child to engage in an act of prostitution.

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2. The definition of "solicit" is adapted from the one used in § 5.02(1), Model Penal Code. Also see § 939.30, defining the inchoate crime of solicitation as "advising" another to commit a crime. Also see § 939.05(2)(c), defining party to a crime liability in terms of "advises, hires, counsels or procures another to commit a crime."

3. If a definition of "sexual intercourse" is needed, see Wis JI-Criminal 2101B.

4. The committee concluded that "act of prostitution" as used in § 948.08 must refer to those acts that could be the basis for a charge of prostitution under § 944.30: sexual intercourse, acts of sexual gratification, masturbation, and sexual contact.

5. Section 939.23(6).

6. Section 939.43(2).

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2136A PATRONIZING A CHILD — § 948.081

Statutory Definition of the Crime

Section 948.081 of the Criminal Code of Wisconsin is violated by one who enters or remains in any place of prostitution with intent to have nonmarital sexual intercourse or to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact with a child.

State's Burden of Proof

Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant entered or remained in a place of prostitution.

   "Place of prostitution" means any place where persons habitually engage in or offer to engage in nonmarital acts of sexual intercourse or sexual contact for anything of value.[1]

2. The defendant entered or remained in the place with intent to (have nonmarital sexual intercourse) (commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another) (commit an act of masturbation) (have sexual contact) with a person who had not attained the age of 18 years at the time of the alleged offense.[2]

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Knowledge of the person's age by the defendant is not required and mistake regarding the person's age is not a defense.[3]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2136A was approved by the Committee in April 2018.

Wis JI-Criminal 2136A is drafted for a violation of § 948.081, created by 2017 Wisconsin Act 128 [effective date: December 10, 2017]. The offense is a Class G felony.

1. "Place of prostitution" is defined in § 939.22(24) as "a place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification . . ., masturbation, or sexual contact for anything of value." The Committee concluded that referring to "acts of sexual intercourse or sexual contact" would make the instruction more understandable to the jury and would cover acts of sexual gratification and masturbation.

If further explanation is required, see § 939.22(36) for a definition of "sexual intercourse" and § 939.22(34) for a definition of "sexual contact."

While the "state must . . . prove 'habitual use' of the premises [as a place of prostitution] beyond a reasonable doubt . . . [it] need not be established by specifically proving a number of incidents beyond a reasonable doubt. Rather, what is required is that evidence be adduced at trial from which the jury can infer 'habitual use.'" Johnson v. State, 76 Wis.2d 672, 678, 251 N.W.2d 834 (1977).

"Habitual" is defined as "customary . . . resorted to on a regular basis." Webster's New Collegiate Dictionary.

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2. The crime is defined as intending to commit one of the specified acts "with a person . . . if that person is a child." "Child" is defined as "a person who has not attained the age of 18 years." § 948.01(1). The statement of element two condenses this into the statement: "with a person who has not attained the age of 18 years."

3. Section 948.081(1) provides: "In a prosecution under this section, it need not be proven that the actor knew the age of the person and it is not a defense that the actor reasonably believed that the person was not a child." This states the same rules as §§ 939.23(6) and 939.43(2).

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2137A SEXUAL ASSAULT OF A FOSTER CHILD — § 948.085(1)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.085(1) of the Criminal Code of Wisconsin, is committed by a person who has sexual [contact] [intercourse] with a child for whom the person is a foster parent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. (Name of victim) was under the age of 18 years[1] at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim)'s age is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

   Consent to sexual [contact] [intercourse] is not a defense.[4]

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3. The defendant was a foster parent to (name of victim).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2137A was originally published in 2007. This revision was approved by the Committee in July 2009.

This instruction is for violations of § 948.085(1), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(2), see Wis JI-Criminal 2137B.

The 2010 revision deleted reference to "treatment foster parent" which was removed from § 948.085 by 2009 Wisconsin Act 28 (Section 3353).

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

2. Section 939.23(6).

3. Section 939.43(2).

4. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2137B SEXUAL ASSAULT OF A CHILD PLACED IN A SUBSTITUTE CARE FACILITY[1] — § 948.085(2)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.085(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual [contact] [intercourse] with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible[2] for managing the facility).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim) .

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. (Name of victim) was under the age of 18 years[3] at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim) 's age is not required[4] and mistake regarding (name of victim) 's age is not a defense.[5]

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Consent to sexual [contact] [intercourse] is not a defense.[6]

3. (Name of victim) was placed in a substitute care facility.

"Substitute care facility" means

[a shelter care facility licensed under s. 48.66(1)(a).][7]

[a group home licensed under s. 48.625 or 48.66(1).][8]

[a facility described in s. 940.295(2)(m).][9]

4. The defendant (worked or volunteered at the facility) (was responsible[10] for managing the facility).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2137B was approved by the Committee in August 2006.

This instruction is for violations of § 948.085(2), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(1), see Wis JI-Criminal 2137A.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. The instruction uses the term "substitute care facility," borrowing it from the title of the statute.

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The offense definition refers to "any of the following facilities" and then lists three types of facilities that are defined primarily by cross references to other statutes. See notes 7, 8, and 9, below.

2. The statute refers to a person who "is directly or indirectly responsible" for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being "indirectly" responsible for managing the facility it may be helpful to add "directly or indirectly" to the fourth element. See note 10, below.

3. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

4. Section 939.23(6).

5. Section 939.43(2).

6. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

7. Section 48.66(1)(a) refers to licensing shelter care facilities but does not provide a definition of the term.

8. Section 48.625 requires a license to operate a group home but does not provide a definition of the term. Section 48.66(1) lists a variety of institutions and agencies.

9. Section 940.295(2)(m) refers to: "A residential care center for children and youth operated by a child welfare agency licensed under s. 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children."

Sec. 48.60 does not include a definition or list of agencies to which it applies. Sub. (2) lists many types of institutions to which it does not apply.

10. The statute refers to a person who "is directly or indirectly responsible" for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being "indirectly" responsible for managing the facility it may be helpful to add "directly or indirectly" to the fourth element.

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2138 SEXUAL INTERCOURSE WITH A CHILD — § 948.09

Statutory Definition of the Crime

Sexual intercourse with a child, as defined in § 948.09 of the Criminal Code of Wisconsin, is committed by one who has attained the age of 19 years and has sexual intercourse with a child[1] who has not attained the age of 18 years[2] and who is not his or her spouse.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements where present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).

2. (Name of victim) had not attained the age of age of 18 years at the time of the alleged sexual intercourse.

   Knowledge of (name of victim)'s age is not required[3] and mistake regarding (name of victim)'s age is not a defense.[4]

   Consent to sexual intercourse is not a defense.[5]

3. Defendant had attained the age of 19 year at the time of the alleged sexual intercourse.[6]

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4. (Name of victim) was not the defendant's spouse at the time of the alleged sexual intercourse.

Meaning of Sexual Intercourse

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, then you should find the defendant guilty.

If you are not so satisfied, then you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2138 was originally published in 1989 and revised in 1996 and 2009. This revision was approved by the Committee in June 2018 and involved adding element 3 pertaining to the age of the defendant.

This instruction is for a violation of § 948.09, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.09 replaces sub. (2) of § 944.15 which prohibits sexual intercourse with a minor who is 16 years old or older but younger than 18. It replaces sub. (2)(b) of § 944.17 which prohibited acts of sexual gratification with a minor of the same age. Repeal of the sexual gratification statute was possible because the definition of sexual intercourse covers all of the acts covered by the former statute.

Section 948.09 was amended by 2017 Wisconsin Act 174 to add the following at the end of the offense definition: "...if the defendant has attained the age of 19 years when the violation occurs." The effective date of the change is March 30, 2018.

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

2. The instruction states the age limits "has not attained the age of 18 years" because this is how "child" is defined in § 948.01(1). The Committee believes that is preferable to following the statement in § 948.09 that the victim must be "a child . . . who has attained the age of 16 years." There is no reason to submit the lower age limit (has attained the age of 16 years) to the jury because if the victim is under the age of 16, the offense would be a more serious one: sexual assault of a child defined in § 948.02(1) or (2).

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This interpretation comports with the common sense conclusion that a person should not be able to defend against a criminal charge on the grounds that he or she is actually guilty of a more serious offense that in fact includes the one charged. This issue was raised in a number of cases interpreting the state's homicide law at a time when first degree murder required "premeditated design" and second degree murder required "without design to effect death." Defendant's convicted of second degree murder appealed on the ground that they were really guilty of first degree murder because they intended to kill. The Wisconsin Supreme Court rejected this argument on several occasions. See Walsh v. State, 195 Wis. 543-45, 218 N.W. 714 (1928), and cases cited therein. Though the cases involved jury verdicts finding the defendant guilty of lesser included offenses, the logic of the decision applies in the present context.

3. See § 939.23(6).

4. See § 939.43(2).

5. "Without consent" is not an element of this offense, and the Committee concluded that it may be helpful to advise the jury of that fact.

6. This element was added to reflect changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].

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2138A UNDERAGE SEXUAL ACTIVITY — § 948.093

Statutory Definition of the Crime

Underage sexual activity, as defined in § 948.093 of the Criminal Code of Wisconsin, is committed by one who has not attained the age of 19 years and has [sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years] [sexual intercourse with a child who has attained the age of 15 years] and is not his or her spouse.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. The defendant had not attained the age of 19 years at the time of the alleged sexual [contact] [intercourse].
3. (Name of victim) had attained the age of 15 years [but had not attained the age of 16 years at the time of the alleged sexual contact] [but had not attained the age of 18 years[1] at the time of the alleged sexual intercourse].

   Knowledge of (name of victim)'s age is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

   Consent to sexual [contact] [intercourse] is not a defense.[4]

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4. (Name of victim) was not the defendant's spouse at the time of the alleged sexual [contact] [intercourse].

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2138A was approved by the Committee in June 2018.

This instruction is for criminal violations of § 948.093, underage sexual activity, created by 2017 Wisconsin Act 174 [effective date: March 30, 2018]. This instruction provides for two types of underage sexual activity defined by § 948.093: sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years, or sexual intercourse with a child who has attained the age of 15 years. For violations of § 948.09, see Wis JI-Criminal 2138.

This instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definition material was formerly included in the text of each instructions for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by the 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instructions that is tailored to the facts of the case.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

2. See § 939.23(6).

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3. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's age nor evidence regarding the cause for or reasonableness of that belief is relevant.

4. "Without consent" is not an element of this offense, and the Committee concluded that it may be helpful to advise the jury of that fact.

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2139 SEXUAL ASSAULT OF A CHILD BY A SCHOOL STAFF PERSON — § 948.095(2)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.095(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student.

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present at the time of the offense.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim), who was not the defendant's spouse.

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

2. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.[1]

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Knowledge of (name of victim) 's age is not required[2] and mistake regarding (name of victim) 's age is not a defense.[3]

Consent to sexual [contact] [intercourse] is not a defense.[4]

3. (Name of victim) was enrolled as a student in a school or a school district.

["School" means a public or private elementary or secondary school.][5]

4. The defendant was a member of the school staff of the school or school district in which (name of victim) was enrolled as a student.

["School staff" means any person who provides services to a school or a school board, including an employee of a school or school board and a person who provides services to a school or a school board under a contract.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2139 was originally published in 1997 and revised in 2004. This revision was approved by the Committee in October 2006; it reflects changes made by 2005 Wisconsin Act 274.

This instruction is for violations of § 948.095, which was created by 1995 Wisconsin Act 456 (effective date: July 11, 1996). 2005 Wisconsin Act 274 amended the title of the statute to read as follows: "Sexual assault of a child by a school staff person or a person who works or volunteers with children." Act 274 also created sub. (3), which defines a new offense addressed by Wis JI-Criminal 2139A.

Before being amended by Act 274, the title of the statute referred to "instructional staff" but the text referred simply to "staff." The definition of "school staff" in sub. (1)(b) extends to anyone who provides

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"services" — it is not limited to "instructional services." In State v. Kaster, 2003 WI App 105, 264 Wis.2d 751, 663 N.W.2d 390, the court of appeals noted the potentially broad application of the statutory definition but concluded that it did not make the statute unconstitutional or ambiguous. The statute does not require that a person be "under contract" and can apply to volunteers. The court also concluded that Wis JI-Criminal 2139 adequately instructs the jury on § 948.095. 2003 WI App 105, ¶16. Kaster returned to the appellate courts, claiming that the court of appeals had added a new element to the statute and that he was denied the opportunity to present a defense to that element. The court of appeals held that the first decision "did not create an additional element but instead provided a description of Kaster's relationship with the school for the purpose of analyzing whether Kaster was school staff. . . . Thus, we reject Kaster's argument that he was denied the right to present a defense . . ." State v. Kaster, 2006 WI App 72, ¶8, 292 Wis.2d 252, 714 N.W.2d 238.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. The statute requires that the victim be "a child who has attained the age of 16 years." "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years." Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

2. Section 939.23(6).

3. Section 939.43(2).

4. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

5. This is the definition provided in § 948.095(1)(a).

6. This is the definition provided in § 948.095(1)(b). See the discussion of State v. Kaster in the Comment preceding footnote 1.

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2139A SEXUAL ASSAULT OF A CHILD BY A PERSON WHO WORKS OR VOLUNTEERS WITH CHILDREN — § 948.095(3)

Statutory Definition of the Crime

Sexual assault of a child, as defined in § 948.095(3) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present at the time of the offense.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 21 years.
2. The defendant (engaged in an occupation) (participated in a volunteer position) that required (him) (her) to work or interact directly with children.
3. The defendant had sexual [contact] [intercourse] with (name of victim), who was not the defendant's spouse.

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Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

4. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.[1]

Knowledge of (name of victim)'s age is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

Consent to sexual [contact] [intercourse] is not a defense.[4]

5. (Name of victim) was a person with whom the defendant worked or interacted through (his) (her) (occupation) (volunteer position).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2139A was approved by the Committee in October 2006.

This instruction is for violations of § 948.095(3)(a), which was created by 2005 Wisconsin Act 274 (effective date: April 20, 2006). For violations of § 948.095(2), see Wis JI-Criminal 2139.

Act 274 also changed the title of §948.095 to refer to "school staff person or a person who works or volunteers with children." This, with the addition of sub. (3), arguably makes it more clear that the statute applies to a broad category of individuals. See State v. Kaster, 2003 WI App 105, 264 Wis.2d 751, 663 N.W.2d 390, where the court of appeals noted the potentially broad application of the statute before the

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changes made by Act 274 and concluded that it did not make the statute unconstitutional or ambiguous. See the discussion in the Comment, Wis JI-Criminal 2139.

Subsection (3)(d) of § 948.095 provides that evidence that a person engages in any of several listed occupations or positions is "prima facie evidence that the occupation or position requires him or her to work or interact directly with children . . ." The instruction does not address this provision. See Wis JI-Criminal 225 for a general model for instructing on "prima facie cases."

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

1. The statute requires that the victim be "a child who has attained the age of 16 years." "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years." Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

2. Section 939.23(6).

3. Section 939.43(2).

4. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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2140 EXPOSING GENITALS, PUBIC AREA, OR INTIMATE PARTS TO A CHILD — § 948.10

Statutory Definition of the Crime

Section 948.10 of the Criminal Code of Wisconsin, is violated by one who exposes genitals, pubic area, or intimate parts to a child for the purpose of sexual arousal or sexual gratification.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant exposed (genitals) (pubic area) (name intimate part)[2] to (name of child).

   "Expose" means to exhibit to the view of another person.

2. The defendant exposed (genitals) (pubic area) (name intimate part) for the purpose of the defendant's sexual arousal or sexual gratification.[3]

3. (Name of child) was under the age of 18 years at the time of the alleged offense.

   Knowledge of (name of child)'s age by the defendant is not required[4] and mistake regarding (name of child)'s age is not a defense.[5]

ADD ONE OF THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED.[6]

[4. The defendant had attained the age of 17 years when the alleged offense occurred.[7]]

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[4. The defendant had attained the age of 17 years but not the age of 19 years at the time of the alleged offense and was more than 4 years older[8] than (name of child) .]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all [three] [four] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2140 was originally published in 1989 and revised in 1998, 2007, and 2011. The 2011 revision modified the instruction to reflect the penalty structure created by 2009 Wisconsin Act 202. This revision was approved by the Committee in October 2014; it modified the instruction to reflect changes made by 2013 Wisconsin Act 362.

This instruction is for a violation of § 948.10, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. The offense is similar to the crime defined in § 944.20(2): lewd and lascivious behavior by publicly and indecently exposing a sex organ. (See Wis JI-Criminal 1544.)

Section 948.10 was amended by 2009 Wisconsin Act 202 to create a new penalty structure. [Effective date: May 6, 2010.] Violations are Class I felonies unless conditions specified in sub. (1)(b)1. or 2. are present, in which case violations are Class A misdemeanors. The Committee concluded that the facts determining which penalty applies are best addressed by adding a fourth element for cases where felony violations are charged.

2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.]

There are two different offenses under § 948.10: exposing genitals, pubic area, or intimate parts to a child (this instruction); and, causing a child to expose genitals, pubic area, or intimate parts (see Wis JI-Criminal 2141).

Subsection (2) of § 948.10 provides that "Subsection (1) does not apply under any of the following circumstances:

(a) The child is the defendant's spouse.
(b) A mother's breast-feeding of her child."

The breast-feeding exclusion was created by 1995 Wisconsin Act 165. [Effective date: April 6, 1996.]

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1. Use three elements if the misdemeanor offense is charged; use four elements if the felony offense is charged.

2. 2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.] "Intimate part" is defined in § 939.22(19): "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved.

3. Section 948.10 avoids one of the problems with traditional indecent exposure statutes in that it does not use words like "indecently" or "lewd." Rather, the "purpose of sexual arousal or sexual gratification" is required. This is the phrase used in the definition of "sexual contact" in §§ 940.225(5)(b) and 948.01(5).

4. Section 939.23(6).

5. Section 939.43(2).

6. Section 948.10(1)(a) provides that the penalty for violations of § 948.10 is a Class I felony, "except as provided in par. (b)." Paragraph (b) provides that the penalty is a Class A misdemeanor "if any of the following applies:

> 1. The actor is a child when the violation occurs.
> 2. At the time of the violation, the actor had not attained the age of 19 years and was not more than 4 years older than the child."

The Committee concluded that the preferred way to deal with this penalty structure was to treat the absence of the penalty-reducing facts in sub. (b)1. and 2. as elements of the felony offense. Thus, the instruction provides two alternatives for element 4: that the defendant was not a child (i.e, that the defendant had not attained the age of 17 years); or, that the defendant had attained the age of 17 but not 19 years and was more than 4 years older than the child.

7. For the purposes of prosecuting a person for violating provisions of Chapter 948, the person is a "child" if under the age of 17. Section 948.01(1) provides:

> "Child" means a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the aged of 17 years.

8. A similar four-year age gap is included in § 301.45(1m), the sex offender registration law. In State v. Parmley, 2010 WI App 79, 325 Wis.2d 769, 785 N.W.2d 655, the court held that determining whether the actor is "'not more than 4 years older,' is determined by calculating the time between the birthday of the actor and the birthday of the victim. . . [I]t was error . . . to only compare calendar year ages." ¶28.

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2141 CAUSING A CHILD TO EXPOSE GENITALS, PUBIC AREA, OR INTIMATE PARTS — § 948.10

Statutory Definition of the Crime

Section 948.10 of the Criminal Code of Wisconsin is violated by one who causes a child to expose genitals, pubic area, or intimate parts for the purpose of sexual arousal or sexual gratification.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following [three] [four][1] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused (name of child) to expose (genitals) (pubic area) (name intimate part).[2]

   "Expose" means to exhibit to the view of another person.

2. The defendant caused (name of child) to expose (genitals) (pubic area) (name intimate part) for the purpose of the defendant's sexual arousal or sexual gratification.[3]

3. (Name of child) was under the age of 18 years at the time of the alleged offense.

   Knowledge of (name of child)'s age by the defendant is not required[4] and mistake regarding (name of child)'s age is not a defense.[5] That the defendant had attained the age of 18 at the time of the alleged incident.]

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ADD ONE OF THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED.[6]

[4. The defendant had attained the age of 17 years when the alleged offense occurred.[7]]

[4. The defendant had attained the age of 17 years but not the age of 19 years at the time of the alleged offense and was more than 4 years older[8] than (name of child) .]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all [three] [four] elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2141 was originally published in 1989 and revised in 1998, 2007, and 2011. The 2011 revision modified the instruction to reflect the penalty structure created by 2009 Wisconsin Act 202. This revision was approved by the Committee in October 2014; it modified the instruction to reflect changes made by 2013 Wisconsin Act 362.

This instruction is for a violation of § 948.10, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.10 was amended by 2009 Wisconsin Act 202 to create a new penalty structure. [Effective date: May 6, 2010.] Violations are Class I felonies unless conditions specified in sub. (1)(b)1. or 2. are present, in which case violations are Class A misdemeanors. The Committee concluded that the facts determining which penalty applies are best addressed by adding a fourth element for cases where felony violations are charged.

2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.]

There are two different offenses under § 948.10: exposing genitals or pubic area to a child (see Wis JI-Criminal 2141); and, causing a child to expose genitals or pubic area (this instruction).

Subsection (2) of § 948.10 provides that "Subsection (1) does not apply under any of the following circumstances:

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(a) The child is the defendant's spouse.
(b) A mother's breast-feeding of her child."

The breast-feeding exclusion was created by 1995 Wisconsin Act 165. [Effective date: April 6, 1996.]

1. Use three elements if the misdemeanor offense is charged; use four elements if the felony offense is charged.

2. 2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.] "Intimate part" is defined in § 939.22(19): "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved.

3. Section 948.10 avoids one of the problems with traditional indecent exposure statutes in that it does not use words like "indecently" or "lewd." Rather, the "purpose of sexual arousal or sexual gratification" is required. This is the phrase used in the definition of "sexual contact" in §§ 940.225(5)(b) and 948.01(5).

4. Section 939.23(6).

5. Section 939.43(2).

6. Section 948.10(1)(a) provides that the penalty for violations of § 948.10 is a Class I felony, "except as provided in par. (b)." Paragraph (b) provides that the penalty is a Class A misdemeanor "if any of the following applies:

1. The actor is a child when the violation occurs.
2. At the time of the violation, the actor had not attained the age of 19 years and was not more than 4 years older than the child."

The Committee concluded that the preferred way to deal with this penalty structure was to treat the absence of the penalty-reducing facts in sub. (b)1. and 2. as elements of the felony offense. Thus, the instruction provides two alternatives for element 4: that the defendant was not a child (i.e, that the defendant had not attained the age of 17 years); or, that the defendant had attained the age of 17 but not 19 years and was more than 4 years older than the child.

7. For the purposes of prosecuting a person for violating provisions of Chapter 948, the person is a "child" if under the age of 17. Section 948.01(1) provides:

> "Child" means a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the aged of 17 years.

8. A similar four-year age gap is included in § 301.45(1m), the sex offender registration law. In State v. Parmley, 2010 WI App 79, 325 Wis.2d 769, 785 N.W.2d 655, the court held that determining whether the actor is "'not more than 4 years older,' is determined by calculating the time between the birthday of the actor and the birthday of the victim. . . [I]t was error . . . to only compare calendar year ages." ¶28.

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2142 EXPOSING A CHILD TO HARMFUL MATERIAL — § 948.11(2)(a)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.11(2)(c).][1]

Statutory Definition of the Crime

Exposing a child to harmful material, as defined in § 948.11(2)(a) of the Criminal Code of Wisconsin, is committed by one who, with knowledge of the character and content of the material, knowingly sells, rents, exhibits, plays, distributes, or loans to a child any harmful material, with or without monetary consideration and [knows or reasonably should know that the child has not attained the age of 18 years] [has face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (sold) (rented) (exhibited) (played) (distributed) (loaned) harmful material to (name of child).[3]

   This does not require that the defendant received any monetary consideration.[4]

   "Harmful material"[5] means (identify the type of material)[6] of a person or portion of the human body that depicts nudity, sexually explicit conduct,

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sadomasochistic abuse, physical torture, or brutality, and that is harmful to children.

"Harmful to children"[7] means that quality of any description, narrative account, or representation of nudity,[8] sexually explicit conduct,[9] sexual excitement,[10] sadomasochistic abuse,[11] physical torture, or brutality when it

(1) predominantly appeals to the prurient,[12] shameful or morbid interest of children; and

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[13] as a whole with respect to what is suitable material for children; and

(3) lacks serious literary, artistic, political, scientific, or educational value for children of the age of (name of child),[14] when taken as a whole.

2. The defendant had knowledge of the character and content of the material.[15]

This requires that the defendant knew that the material contained a description, narrative account, or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality.

3. (Name of child) was under the age of 18 years.[16]

4. The defendant [knew or reasonably should have known that the child was under the age of 18 years] [had face-to-face contact with the child before or during the (sale) (rental) (exhibit) (playing) (distribution) (loan)].[17]

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Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2142 was originally published in 1992 and revised in 1997, 1999, 2000, 2003, 2006, 2007, 2009, and 2011. The 2011 revision added "knowingly" to the definition of the crime and to the first element. This revision was approved by the Committee in October 2018; it added the comment in regard to § 948.11(2)(am).

Section 948.11 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. A similar offense was defined by § 944.25 under prior law. That statute was repealed and replaced by § 948.11. There was no uniform instruction for violations of § 944.25.

This instruction is for a violation of § 948.11(2)(a), which prohibits providing a child with harmful material and is punished as a Class E felony. Subsection (2)(am) prohibits verbally communicating a harmful description or narrative to a child and sub. (2)(b) applies to possession of harmful material with intent to transfer and is punished as a Class A misdemeanor. See uniform instruction 2143 for violations of sub. (2)(am). There are no uniform instructions for violations of sub. (2)(b).

Section 948.11 has been described as a "variable obscenity statute" – "a law which prohibits a person from exhibiting to children materials determined to be obscene to children, though not obscene to adults." State v. Kevin L.C., 216 Wis.2d 166, 185, 576 N.W.2d 62 (Ct. App. 1997).

In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), the court held that § 948.11 was not unconstitutionally overbroad.

In State v. Weidner, 2000 WI 52, ¶1, 235 Wis.2d 306, 611 N.W.2d 684, the Wisconsin Supreme Court held that "§ 948.11(2) is unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused." The defect was that the statute

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eliminated a mental state regarding the age of the child while imposing a burden on the defendant to establish lack of knowledge as an affirmative defense. The defense would be extremely difficult, if not impossible, to establish in a case that does not involve face-to-face confrontation. Apparently the statute remained constitutional for situations that do involve face-to-face contact between the defendant and the child. See State v. Kevin L.C., 216 Wis.2d 166, 576 N.W.2d 62 (Ct. App. 1997), upholding the constitutionality of the statute where there was face-to-face interaction.

The statute was amended by 2001 Wisconsin Act 16 to remedy the defect identified in Weidner by adding the requirement reflected in the new fourth element of the instruction: that the defendant knew or reasonably should have known that the child was under the age of 18 years or had face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan.

In State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, the court affirmed a court of appeals decision denying withdrawal of a no contest plea and upholding the constitutionality of § 948.11(2). The defendant gave nude pictures of himself to a 17 year old female clerk at a convenience store, along with letters saying his pictures had been accepted for publication in Playgirl magazine. He sought to withdraw his plea on the ground that he did not understand the "harmful to children" element of the crime. The court found his understanding was adequately demonstrated by the plea form and the plea colloquy. His constitutional claim was also rejected: prior decisions (Thiel and Kevin L.C.) have established that § 948.11(2) is constitutional as applied to situations involving face-to-face interaction. The "personal contact between the perpetrator and the child-victim is what allows the State to impose on the defendant the risk that the victim is a minor." 2002 WI 56, ¶39.

1. This instruction is intended to be used for all cases involving violations of § 948.11(2)(a)1. and for cases involving violations of § 948.11(2)(a)2. where there is not evidence of the defense provided in § 948.11(2)(c). As amended by 2001 Wisconsin Act 16, the defense applies to violations of subsec. (2)(a)2. – those involving violations face-to-face contact – if the defendant "had reasonable cause to believe that the child had attained the age of 18 years" and the child presented documentary evidence of age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

For cases involving the affirmative defense, see Wis JI-Criminal 2142A.

2. The statement of the offense reflects changes in § 948.11(2)(a) made by 2001 Wisconsin Act 16: substituting knowledge of the "character and content" of the material for knowledge of the "nature" of the material; adding "rents," "plays," and "distributes" to the list of prohibited acts and striking "transfers" from that list; and, adding the requirement that the defendant either know or have reason to know the child's age or have face-to-face contact with the child. As to the latter, see State v. Gonzalez, 2011 WI 63, 335 Wis.2d 270, 802 N.W.2d 454, where the court found that selecting the wrong alternative was reversible error.

3. In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), the court construed "exhibit" to mean "to offer or present for inspection," emphasizing that, like the other terms in the statute, it "represents a knowing and affirmative act."

In State v. Gonzalez, 2011 WI 63, 335 Wis.2d 270, 802 N.W.2d 454, the court addressed whether "knowingly" must be added to the jury instruction for this offense. Three justices concluded that the word "knowingly" should simply be added to the instruction. Two justices agreed that this would effectively

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address the problem, but noted that "knowingly" does not appear in the statute and had not been added to the uniform jury instruction. They would not resolve the issue in this case. Two other justices concluded that "knowingly" should not be added because it does not appear in the statute. They hold that the verbs used in the statute all contemplate a "knowing and affirmative act" but apparently conclude that the jury will understand this without a specific instruction.

The Committee concluded that in light of the fact that there is agreement that the statute does require a "knowing and affirmative act," the simplest and clearest way to assure that the jury accurately understands what the statute requires is to add "knowingly" to the instruction.

4. The statutory definition of this offense provides that it applies to transfers of material, "with or without monetary consideration." § 948.11(2)(a). The Committee interprets this provision as one that makes proof of consideration unnecessary, as opposed to one that creates alternative means of proving a required fact. Thus, the instruction recommends telling the jury that proof of consideration is not required. No further mention of consideration is made.

5. This is the definition provided in § 948.11(1)(ar)1. Subsection (1)(ar)2. provides a similar definition applicable to books, other printed matter, recordings, verbal descriptions, and narrative accounts.

6. Here identify the type of material involved: picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image. See sub. (1)(ar)1. of § 948.11. Subdivision 2. of that subsection extends coverage to "any book, pamphlet, magazine, printed matter or recording that contains any matter enumerated in subd. 1."

7. This is the definition provided in § 948.11(1)(b).

In State v. Booker, 2005 WI App 182, 286 Wis.2d 747, 704 N.W.2d 336, the court of appeals reversed a conviction under § 948.11(2) because it found that the evidence was not sufficient to establish that the material was "harmful to children." The material was on a videotape that the jury did not view. The Wisconsin Supreme Court reversed, concluding that "testimony that depicted the content of the video scenes shown to the children was sufficient to support the jury's verdict." State v. Booker, 2006 WI 79, ¶1, 292 Wis.2d 43, 717 N.W.2d 676.

8. "Nudity" is defined in § 948.11(1)(d).

9. "Sexually explicit conduct" is defined in § 948.01(7).

10. "Sexual excitement" is defined in § 948.11(1)(f).

11. "Sadomasochistic abuse" is defined in § 948.01(4).

12. The definition of "harmful to children" is based in part on the three-part test used to define obscenity. One part of that definition refers to "prurient interest." Jury instructions defining "prurient interest" in a proceeding under § 944.21, Obscene material or performance, were reviewed in County of Kenosha v. C&S Management, 223 Wis.2d 373, 588 N.W.2d 236 (1999). The court held that the following instruction complied with the constitutional test based on Miller v. California, 413 U.S. 15 (1973):

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> 'Appealing to the prurient interest' does not encompass normal healthy sexual desires but means the material appeals generally to a shameful, unhealthy, unwholesome, degrading or morbid interest in sex, nudity, or excretion.

A second part of the definition refers to "prevailing standards in the adult community as a whole." In State v. Tee & Bee, Inc., 229 Wis.2d 446, 600 N.W.2d 230 (Ct. App. 1999), the court found three errors in a jury instruction under § 944.21. Two of those errors related to the relevant "community standard" used to determine whether material is obscene: contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community (229 Wis.2d 446, 452); and, statewide community standards must be used, not standards of a smaller geographic area (229 Wis.2d 446, 454).

In Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), the court held that reliance on "community standards" to determine whether material is "harmful to minors" under the federal Child Online Protection Act does not by itself make that statute unconstitutionally overbroad. The court did find the statute unconstitutionally overbroad on other grounds.

13. The reference to the "adult community of Wisconsin" was added in 2009 in response to an unpublished decision of the Wisconsin Court of Appeals that suggested the failure to include that reference "invites error." See, State v. McCoy, 2008 AP 1512-CR, December 23, 2008.

14. See State v. Thiel, 183 Wis.2d 505, 536, 515 N.W.2d 847 (1994) and State v. Trochinski, 2002 WI 56, ¶32, 253 Wis.2d 38, 644 N.W.2d 891, which hold that whether the material is "harmful to children" is to be judged by reference to a reasonable minor "of like age" with the child in the case, at least as to the issue of literary, artistic, political, scientific, or educational value under § 948.11(1)(b)3.

15. This knowledge element is stated in these terms by § 948.11(2)(a) as revised by 2001 Wisconsin Act 16. Before that change, the statute referred to knowledge of the "nature" of the material and defined that as knowledge of the "character and content" of the material.

The Committee concluded that "knowledge of the character and content" of the material refers to knowledge that the material contains "any description or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality." The quoted material is from the first part of the definition of "harmful to children" in § 948.11(1)(b). The balance of that definition describes the attributes of the material that makes it the equivalent of "obscene." As is the case with criminal prohibition of obscenity, knowledge of those attributes, which are essentially legal issues, is not required. See Hamling v. United States, 418 U.S. 121, 123 (1974):

> . . . . It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

16. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years." Section 948.11 does not require the state to prove that a defendant knew the person to whom the harmful materials are transfered is a child. State v. Kevin L.C., 216 Wis.2d 166, 185, 576 N.W.2d 62 (Ct. App. 1997). This does not make the statute unconstitutional, because it criminalizes acts in which the defendant confronts

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the underage victim personally and therefore may reasonably be required to ascertain the victim's age. Id. at 187.

17. The alternative supported by the evidence should be selected. This element was added in response to changes made in the statute by 2001 Wisconsin Act 16. If the second alternative is used – face-to-face contact – and there is evidence of the affirmative defense defined in sub. (2)(c), Wis JI-Criminal 2142A should be used. As to the latter, see State v. Gonzalez, 2011 WI 63, 335 Wis.2d 270, 802 N.W.2d 454, where the court found that selecting the wrong alternative was reversible error.

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2142A EXPOSING A CHILD TO HARMFUL MATERIAL: FACE-TO-FACE CONTACT AFFIRMATIVE DEFENSE — § 948.11(2)(a)2. and (c)

[USE THIS INSTRUCTION FOR VIOLATIONS OF § 948.11(2)(a)2. IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.11(2)(c).][1]

Statutory Definition of the Crime

Exposing a child to harmful material, as defined in § 948.11(2)(a) of the Criminal Code of Wisconsin, is committed by one who, with knowledge of the character and content of the material, sells, rents, exhibits, transfers, or loans to a child any harmful material, with or without monetary consideration and has face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (sold) (rented) (exhibited)[3] (played) (distributed) (loaned) harmful material to (name of child).

   This does not require that the defendant received any monetary consideration.[4]

   "Harmful material"[5] means (identify the type of material)[6] of a person or portion of the human body that depicts nudity, sexually explicit conduct, sadomasochistic abuse, physical torture, or brutality, and that is harmful to children.

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"Harmful to children"[7] means that quality of any description, narrative account, or representation of nudity,[8] sexually explicit conduct,[9] sexual excitement,[10] sadomasochistic abuse,[11] physical torture, or brutality when it

(1) predominantly appeals to the prurient,[12] shameful or morbid interest of children; and

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[13] as a whole with respect to what is suitable material for children; and

(3) lacks serious literary, artistic, political, scientific, or educational value for children of the age of (name of child),[14] when taken as a whole.

2. The defendant had knowledge of the character and content of the material.[15]

This requires that the defendant knew that the material contained a description, narrative account, or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality.

3. (Name of child) was under the age of 18 years.[16]

4. The defendant had face-to-face contact with the child before or during the (sale) (rental) (exhibit) (playing) (distribution) (loan).[17]

Consider Whether The Defense Is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years and that (name of

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child) exhibited to the defendant (a draft card) (a driver's license) (a birth certificate) (an official or apparently official document) purporting to establish that (name of child) had attained the age of 18 years.[18]

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[19]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[20]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[21]

COMMENT

Wis JI-Criminal 2142A was originally published in 2001 and revised in 2003 and 2006. This revision was approved by the Committee in February 2009.

This instruction is for a violation of § 948.11(2)(a) involving face-to-face contact and where there is evidence of the defense provided in sub. (2)(c) of the same statute. See Wis JI-Criminal 2142 for the

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instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

Where the offense involves material on a videotape, producing evidence sufficient to establish that the material is "harmful to children" is likely to require that the jury view the videotape. See State v. Booker, 2005 WI App 182, 286 Wis.2d 747, 704 N.W.2d 336, discussed in note 7, below.

Section 948.11 has been described as a "variable obscenity statute" — "a law which prohibits a person from exhibiting to children materials determined to be obscene to children, though not obscene to adults." State v. Kevin L.C., 216 Wis.2d 166, 185, 576 N.W.2d 62 (Ct. App. 1997).

In State v. Weidner, 2000 WI 52, ¶1, 235 Wis.2d 306, 611 N.W.2d 684, the Wisconsin Supreme Court held that "§ 948.11(2) is unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused." The defect was that the statute eliminated a mental state regarding the age of the child while imposing a burden on the defendant to establish lack of knowledge as an affirmative defense. The defense would be extremely difficult, if not impossible, to establish in a case that does not involve face-to-face confrontation. Apparently the statute remained constitutional for situations that do involve face-to-face contact between the defendant and the child. See State v. Kevin L.C., 216 Wis.2d 166, 576 N.W.2d 62 (Ct. App. 1997), upholding the constitutionality of the statute where there was face-to-face interaction.

The statute was amended by 2001 Wisconsin Act 16 to remedy the defect identified in Weidner by adding the requirement reflected in the new fourth element of the instruction: that the defendant knew or reasonably should have known that the child was under the age of 18 years or had face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan.

In State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, the court affirmed a court of appeals decision denying withdrawal of a no contest plea and upholding the constitutionality of § 948.11(2). The defendant gave nude pictures of himself to a 17 year old female clerk at a convenience store, along with letters saying his pictures had been accepted for publication in Playgirl magazine. He sought to withdraw his plea on the ground that he did not understand the "harmful to children" element of the crime. The court found his understanding was adequately demonstrated by the plea form and the plea colloquy. His constitutional claim was also rejected: prior decisions (Thiel and Kevin L.C.) have established that § 948.11(2) is constitutional as applied to situations involving face-to-face interaction. The "personal contact between the perpetrator and the child-victim is what allows the State to impose on the defendant the risk that the victim is a minor." 2002 WI 56, ¶ 39.

1. This instruction is intended to be used for cases involving violations of § 948.11(2)(a)2. where there is evidence of the defense provided in § 948.11(2)(c). The defense applies to cases where there has been face-to-face contact if the defendant "had reasonable cause to believe that the child had attained the age of 18 years" and the child has exhibited documentary evidence purporting to establish that age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. The statement of the offense reflects changes in § 948.11(2)(a) made by 2001 Wisconsin Act 16: substituting knowledge of the "character and content" of the material for knowledge of the "nature" of the material; adding "rents," "plays," and "distributes" to the list of prohibited acts and striking "transfers" from that list; and, adding the requirement that the defendant have face-to-face contact with the child.

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3. See note 3, Wis JI-Criminal 2142.

4. See note 4, Wis JI-Criminal 2142.

5. See note 5, Wis JI-Criminal 2142.

6. Here identify the type of material involved: picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image. See sub. (1)(ar)1. of § 948.11. Subdivision 2. of that subsection extends coverage to "any book, pamphlet, magazine, printed matter or recording that contains any matter enumerated in subd. 1."

7. See note 7, Wis JI-Criminal 2142.

8. See note 8, Wis JI-Criminal 2142.

9. See note 9, Wis JI-Criminal 2142.

10. See note 10, Wis JI-Criminal 2142.

11. See note 11, Wis JI-Criminal 2142.

12. See note 12, Wis JI-Criminal 2142.

13. See note 13, Wis JI-Criminal 2142.

14. See State v. Thiel, 183 Wis.2d 505, 536, 515 N.W.2d 847 (1994) and State v. Trochinski, 2002 WI 56, ¶32, 253 Wis.2d 38, 644 N.W.2d 891, which hold that whether the material is "harmful to children" is to be judged by reference to a reasonable minor "of like age" with the child in the case, at least as to the issue of literary, artistic, political, scientific, or educational value under § 948.11(1)(b)3.

15. See note 14, Wis JI-Criminal 2142.

16. See note 15, Wis JI-Criminal 2142.

17. This element was added in response to changes made in the statute by 2001 Wisconsin Act 16, specifically, adding subsec. (2)(a)2.

18. This is the full statement of the defense found in sub. (2)(c).

19. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

20. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and,

2) not guilty even though the elements are proven, because the defense has been established.

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2143 EXPOSING A CHILD TO HARMFUL MATERIAL: VERBALLY COMMUNICATING A HARMFUL DESCRIPTION OR NARRATIVE ACCOUNT — § 948.11(2)(am)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.11(2)(c).][1]

Statutory Definition of the Crime

Exposing a child to harmful material, as defined in § 948.11(2)(am) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 17 and who, with knowledge of the character and content of the material, verbally communicates, by any means, a harmful description or narrative account to a child, with or without monetary consideration and [knows or reasonably should know that the child has not attained the age of 18 years] [has face-to-face contact with the child before or during the communication].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 17 at the time of the alleged offense.
2. The defendant verbally communicated,[3] by any means, a harmful description or narrative account to (name of child).

   [This does not require that the defendant received any monetary consideration.][4]

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"Harmful description or narrative account" means any explicit and detailed description or narrative account of sexual excitement, sexually explicit conduct, sadomasochistic abuse, physical torture, or brutality that, taken as a whole, is harmful to children.[5]

"Harmful to children"[6] means that quality of any description, narrative account, or representation of nudity,[7] sexually explicit conduct,[8] sexual excitement,[9] sadomasochistic abuse,[10] physical torture, or brutality when it

(1) predominantly appeals to the prurient, shameful, or morbid interest of children; and

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[11] as a whole with respect to what is suitable material for children; and

(3) lacks serious literary, artistic, political, scientific, or educational value for children of the age of (name of child),[12] when taken as a whole.[13]

3. The defendant had knowledge of the character and content of the material.[14]

This requires that the defendant knew that the material contained a description, narrative account, or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality.

4. (Name of child) was under the age of 18 years.[15]

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5. The defendant [knew or reasonably should have known that (name of child) was under the age of 18 years] [had face-to-face contact with (name of child) before or during the communication].[16]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2143 was originally published in 2008 and revised in 2009. This revision was approved by the Committee in October 2018.

Section 948.11 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. A similar offense was defined by § 944.25 under prior law. That statute was repealed and replaced by § 948.11. There was no uniform instruction for violations of § 944.25.

This instruction is for a violation of § 948.11(2)(am), which prohibits verbally communicating a harmful description or narrative to a child.

In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), the court held that § 948.11 was not unconstitutionally overbroad.

In State v. Weidner, 2000 WI 52, ¶1, 235 Wis.2d 306, 611 N.W.2d 684, the Wisconsin Supreme Court held that "§ 948.11(2) is unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused." The defect was that the statute eliminated a mental state regarding the age of the child while imposing a burden on the defendant to establish lack of knowledge as an affirmative defense. The defense would be extremely difficult, if not impossible, to establish in a case that does not involve face-to-face confrontation. Apparently the statute remained constitutional for situations that do involve face-to-face contact between the defendant and the child. See State v. Kevin L.C., 216 Wis.2d 166, 576 N.W.2d 62 (Ct. App. 1997), upholding the constitutionality of the statute where there was face-to-face interaction.

The statute was amended by 2001 Wisconsin Act 16 to remedy the defect identified in Weidner by adding the requirement reflected in the new fifth element of the instruction: that the defendant knew or reasonably should have known that the child was under the age of 18 years or had face-to-face contact with the child before or during the communication.

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In State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, the court affirmed a court of appeals decision denying withdrawal of a no contest plea and upholding the constitutionality of § 948.11(2). The defendant gave nude pictures of himself to a 17 year old female clerk at a convenience store, along with letters saying his pictures had been accepted for publication in Playgirl magazine. He sought to withdraw his plea on the ground that he did not understand the "harmful to children" element of the crime. The court found his understanding was adequately demonstrated by the plea form and the plea colloquy. His constitutional claim was also rejected: prior decisions (Thiel and Kevin L.C.) have established that § 948.11(2) is constitutional as applied to situations involving face-to-face interaction. The "personal contact between the perpetrator and the child-victim is what allows the State to impose on the defendant the risk that the victim is a minor." 2002 WI 56, ¶39.

1. This instruction is intended to be used for all cases involving violations of § 948.11(2)(am)1. and for cases involving violations of § 948.11(2)(am)2. where there is not evidence of the defense provided in § 948.11(2)(c). As amended by 2001 Wisconsin Act 16, the defense applies to violations of subsec. (2)(am)2. – those involving violations face-to-face contact – if the defendant "had reasonable cause to believe that the child had attained the age of 18 years" and the child presented documentary evidence of age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

For cases involving the affirmative defense, see Wis JI-Criminal 2142A, which can be used as model for adapting this instruction.

2. Choose the applicable alternative. See, § 948.11(2)(am)1. and 2.

3. In State v. Ebersold, 2007 WI App 232, ¶14, 306 Wis.2d 371, 742 N.W.2d 876, the court held that "'verbally' is most reasonably read here as proscribing communication to children of harmful matter in words, whether oral or written, and to distinguish § 948.22(2)(am) from § 948.22(2)(a), which primarily proscribes visual representations." Thus, the court held that the statute applied to Ebersold's message sent via an Internet chat room.

4. The statutory definition of this offense provides that it applies to transfers of material, "with or without monetary consideration." § 948.11(2)(am). The Committee interprets this provision as one that makes proof of consideration unnecessary, as opposed to one that creates alternative means of proving a required fact. The Committee recommends telling the jury that proof of consideration is not required if the issue has been raised in the case. No further mention of consideration is made.

5. This is the definition provided in § 948.11(1)(ag).

6. This is the definition provided in § 948.11(1)(b).

7. "Nudity" is defined in § 948.11(1)(d).

8. "Sexually explicit conduct" is defined in § 948.01(7).

9. "Sexual excitement" is defined in § 948.11(1)(f).

10. "Sadomasochistic abuse" is defined in § 948.01(4).

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11. The reference to the "adult community of Wisconsin" was added in 2009 in response to an unpublished decision of the Wisconsin Court of Appeals that suggested the failure to include that reference "invites error." See, State v. McCoy, 2008 AP 1512-CR, December 23, 2008.

12. See State v. Thiel, 183 Wis.2d 505, 536, 515 N.W.2d 847 (1994) and State v. Trochinski, 2002 WI 56, ¶32, 253 Wis.2d 38, 644 N.W.2d 891, which hold that whether the material is "harmful to children" is to be judged by reference to a reasonable minor "of like age" with the child in the case, at least as to the issue of literary, artistic, political, scientific, or educational value under § 948.11(1)(b)3.

13. The definition of "harmful to children" is based in part on the three-part test used to define obscenity. One part of that definition refers to "prurient interest." Jury instructions defining "prurient interest" in a proceeding under § 944.21, Obscene material or performance, were reviewed in County of Kenosha v. C&S Management, 223 Wis.2d 373, 588 N.W.2d 236 (1999). The court held that the following instruction complied with the constitutional test based on Miller v. California, 413 U.S. 15 (1973):

> 'Appealing to the prurient interest' does not encompass normal healthy sexual desires but means the material appeals generally to a shameful, unhealthy, unwholesome, degrading or morbid interest in sex, nudity, or excretion.

A second part of the definition refers to "prevailing standards in the adult community as a whole." In State v. Tee & Bee, Inc., 229 Wis.2d 446, 600 N.W.2d 230 (Ct. App. 1999), the court found three errors in a jury instruction under § 944.21. Two of those errors related to the relevant "community standard" used to determine whether material is obscene: contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community (229 Wis.2d 446, 452); and, statewide community standards must be used, not standards of a smaller geographic area (229 Wis.2d 446, 454).

In Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), the court held that reliance on "community standards" to determine whether material is "harmful to minors" under the federal Child Online Protection Act does not by itself make that statute unconstitutionally overbroad. The court did find the statute unconstitutionally overbroad on other grounds.

14. This knowledge element is stated in these terms by § 948.11(2)(am).

The Committee concluded that "knowledge of the character and content" of the material refers to knowledge that the material contains "any description or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality." The quoted material is from the first part of the definition of "harmful to children" in § 948.11(1)(b). The balance of that definition describes the attributes of the material that makes it the equivalent of "obscene." As is the case with criminal prohibition of obscenity, knowledge of those attributes, which are essentially legal issues, is not required. See Hamling v. United States, 418 U.S. 121, 123 (1974):

> . . . . It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

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15. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

16. The alternative supported by the evidence should be selected. If the second alternative is used – face-to-face contact – and there is evidence of the affirmative defense defined in sub. (2)(c), see Wis JI-Criminal 2142A for a model incorporating the affirmative defense.

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2146 POSSESSION OF CHILD PORNOGRAPHY — § 948.12(1m)

INSTRUCTION WITHDRAWN

COMMENT

Wis JI-Criminal 2146 was originally published in 1994 and withdrawn in 2002 when it was divided into two versions: Wis JI-Criminal 2146A Child Pornography: Possession Of A Recording, and Wis JI-Criminal 2146B Child Pornography: Exhibiting Or Displaying A Recording.

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2146A CHILD PORNOGRAPHY: POSSESSION OF OR ACCESSING A RECORDING — § 948.12(1m)

Statutory Definition of the Crime

Possession of child pornography, as defined in § 948.12(1m) of the Criminal Code of Wisconsin, is committed by one who knowingly possesses[1] or accesses in any way with intent to view any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct, knows or reasonably should know that the recording contained depictions of sexually explicit conduct, and knows or reasonably should know that the child depicted in the material has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (possessed a recording) (accessed a recording in any way with intent to view it).[2]

   ["Possessed" means that the defendant knowingly[3] had actual physical control of the recording.][4]

   ADD THE FOLLOWING PARAGRAPHS IN POSSESSION CASES WHEN THEY ARE SUPPORTED BY THE EVIDENCE:

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[A recording is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the recording.]

[It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording.]

[Possession may be shared with another person. If a person exercises control over a recording, the recording is in that person's possession, even though another person may also have similar control.]

"Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

2. The recording showed a child engaged in sexually explicit conduct.

A child is a person who is under the age of 18 years.[6]

"Sexually explicit conduct" means[7] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[8]

3. The defendant knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated _____.[9]

4. The defendant knew or reasonably should have known[10] that the person [shown in the recording] [depicted in the material] engaged in sexually explicit conduct was under the age of 18 years.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2146 in 1992 and revised in 1998, 2002, 2003, 2006, 2007, and 2011. The 2002 revision involved renumbering as Wis JI-Criminal 2146A, adopting a new format, and updating the instruction to reflect changes made in the statute by 2001 Wisconsin Act 16. The 2006 revision added a definition of "possession" to element 1. The February 2007 revision involved adding a special question at the end of the instruction and updating the Comment. The 2011 revision added to footnote 4. This revision was approved by the Committee in October 2012; it reflects changes made by 2011 Wisconsin Acts 271 and 272.

This instruction is for a violation of § 948.12(1m), as amended by 2011 Wisconsin Act 271, effective date: April 24, 2012. For a violation of § 948.12(2m), created by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146B.

The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

In State v. Whistleman, 2001 WI App 189, 247 Wis.2d 337, 633 N.W.2d 249, the court held that "pictorial reproductions" as used in § 948.12, 1999-2000 Wis. Stats., included computer disks that store

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images of child pornography. 2001 Wisconsin Act 16 amended § 948.12 by replacing "pictorial reproduction" with "recording," defining the latter in § 948.01(3r) to include "storage of data representing an image. . ."

In State v. Multaler, 2002 WI 35, 252 Wis.2d 54, 643 N.W.2d 437, the court held that charging a separate count under § 948.12, 1997-98 Wis. Stats., for each of 28 files containing pornographic images on two computer diskettes did not violate the rule prohibiting multiplicitous charges. Also see State v. Schaefer, 2003 WI App 164, 266 Wis.2d 719, 668 N.W.2d 760.

Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a minimum sentence of 3 years for violations of § 948.12. Section 939.617 was amended by 2011 Wisconsin Act 272 [effective date: April 24, 2012] to limit the exception to the minimum sentence for violations of § 948.12 to those where the defendant "is no more than 48 months older than the child who engaged in the sexually explicit conduct." See § 939.617(2)(b).

1. Section 948.12(1m)(a) requires that "the person knows that he or she possesses the material." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowing possession."

2. Section 948.12(1m) was amended by 2011 Wisconsin Act 271 [effective date: April 24, 2012] to add "or accesses in any way with intent to view" as an alternative to possession. This change may address some of the difficulties presented by trying to apply "possession" to certain fact situations. See footnote 4, below, and State v. Mercer, cited therein.

The statute prohibits possession or accessing of undeveloped film, a photographic negative, a photograph, a motion picture, a videotape, or a recording. The statute was revised by 2001 Wisconsin Act 16 [effective date: September 1, 2001] to delete reference to "pictorial reproduction" and "audio recording" and replace them with "recording." "Recording" is defined in § 948.01(3r) as follows: "'Recording' includes the creation of a reproduction of an image or a sound or the storage of data representing an image or a sound." The Committee concluded that the new term "recording" is defined to include all the specific items listed in the statute. That is, undeveloped film, or a photographic negative, or a photograph, etc., is a "recording" as that term is defined in § 948.01(3r). The Committee further concluded that it is permissible to instruct the jury that, for example, "A photographic negative is a recording." This applies only to items listed in the statute; whether other items qualify as a "recording" is a factual issue for the jury to resolve.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the item is arguably under the defendant's control but not directly in the physical possession of the defendant.

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See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

Questions about "knowing possession" and "control" of a recording arise in cases involving images on a computer hard drive. In State v. Lindgren, 2004 WI App 159, 275 Wis.2d 851, N.W.2d, the court of appeals found that the evidence was sufficient to show "possession" where images were "cached" on the hard drive and there was evidence that the defendant knew that would happen when he accessed pornographic material. Lindgren adopted the rationale of U.S. v. Tucker, 305 F.3d. 1193 (10th Cir. 2002).

In State v. Mercer, 2010 WI App 47, 324 Wis.2d 506, 782 N.W.2d 125, the court held that possession of images of child pornography in violation of § 948.12(1m) can be proved by evidence from computer monitoring software showing that the defendant searched for and obtained access to web sites and viewed the images. It is not required that the defendant retained control of the images after viewing them by, for example, storing them on the computer or allowing them to remain in the computer's cache. The court's conclusion:

> . . . an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the Internet and views those images knowing that they contain child pornography. Whether the proof is hard drive evidence or something else, such as the monitoring software here, should not matter because both capture a "videotape" of the same behavior. And images in either place can be controlled by taking actions like printing or copying the images. ¶31.

The trial court in the Mercer case had added to the standard definition of "possession" in the instruction, giving examples of what could constitute possession:

> [p]ossessed means that the defendant knowingly had actual physical control of the recording, or that the recording is in an area over which the person has control and the person intends to exercise control over the recording.
>
> In cases involving digital images, if you are satisfied that the defendant intentionally visited child pornography websites when [sic] contained child pornography images; and (a) acted on or manipulated the child pornography image; or (b) viewed the child pornography image knowing that his web browser automatically saved the image in the temporary Internet cache file; you may find knowing possession of such images.
>
> It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording. Recording means a reproduction of an image or a sound or the storage of data representing an image or a sound, including a digital image.

The court of appeals commented that this instruction "actually inured to Mercer's benefit because it gave an example fitting his theory of defense, a defense to which he was not entitled." ¶36.

For two articles providing helpful information about basic computer functioning and analysis of the "possession" of material viewed via computer see: Ty E. Howard, Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files, 19 Berkeley Tech. L.J. 1227, 1267-68 (2004); Giannina Marin, Possesson of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?, 60 Fla. L. Rev. 1205, 1213-14 (2008).

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5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. See note 2, supra. "Means" was substituted for the phrase "includes the creation of" used in the statutory definition. No change in substance was intended.

6. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years.

7. Section 948.01(7) defines "sexually explicit conduct" as follows:

> "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
> (b) Bestiality;
> (c) Masturbation;
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
> (e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

> "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

9. The statement of the third element reflects changes made by 2011 Wisconsin Act 271 [effective date: April 24, 2012]. The change added "or reasonably should know" as an alternative to "know." It also deleted the reference to "the character and content" of the conduct and replaced it with "material that contains depictions of" sexually explicit conduct. The Committee concluded that the best way to describe this requirement to the jury is to insert the name of the type of conduct used in the preceding element.

10. The "knew or reasonably should have known" requirement is set forth in § 948.12(1m)c. This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). This element satisfies the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

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11. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: possession of a recording, under sec. 948.12(1m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2146B CHILD PORNOGRAPHY: EXHIBITING OR PLAYING A RECORDING — § 948.12(2m)

Statutory Definition of the Crime

Section 948.12(2m) of the Criminal Code of Wisconsin, is violated by one who knowingly exhibits or plays a recording of a child engaged in sexually explicit conduct, knows the character and content of the sexually explicit conduct in the material, and knows or reasonably should know that the child has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (exhibited)[1] (played) a recording.[2]

   "Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[3]

2. The recording showed a child engaged in sexually explicit conduct.

   A child is a person who is under the age of 18 years.[4]

   "Sexually explicit conduct" means[5] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[6]

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3. The defendant knew that the recording showed a person engaged in actual or simulated _____.[7]

4. The defendant knew or reasonably should have known[8] that the person shown in the recording engaged in sexually explicit conduct was under the age of 18 years.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[9]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2146B was originally published in 2002 and revised in 2004. This revision was approved by the Committee in February 2007; it involved adding a special question at the end of the instruction and updating the Comment.

This instruction is for a violation of § 948.12(2m), as created by 2001 Wisconsin Act 16, effective date: September 1, 2001. For a violation of § 948.12(1m), as amended by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146A, Possession of Child Pornography.

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The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

Section 948.12 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 3 years for violations of § 948.12.

1. 2001 Wisconsin Act 16 created § 948.01(1d), which reads as follows:

(1d) "Exhibit," with respect to a recording of an image that is not viewable in its recorded form, means to convert the recording of the image into a form in which the image may be viewed.

2. Section 948.12(2m)(a) requires that "the person knows that he or she has exhibited or played the recording." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowingly (exhibited) (played) a recording."

3. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

4. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

5. Section 948.01(7) defines "sexually explicit conduct" as follows:

"Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

6. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

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The term "lewd exhibition" also appeared in § 940.203, 1987 Wis. Stats., which was recreated as § 948.05. In State v. Lubotsky, 148 Wis.2d 435, 434 N.W.2d 859 (Ct. App. 1988), the court approved reference to standard dictionaries to define the term as used in § 940.203. The court referred with approval to defining "lewd" as "inciting to sensual desire or imagination." 148 Wis.2d 435, 438-39.

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough — the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

7. Insert the name of the type of conduct used in the preceding element. Section 948.12(2) requires that "the person know the character and content of the sexually explicit conduct shown in the material." (Emphasis added.) The Committee concluded that stating this requirement as, for example, "knowing that the photograph showed actual or simulated sexual intercourse" adequately covers the "character and content" aspect.

8. The "knew or reasonably should have known" requirement is explicitly set forth in § 948.12(2m)(c). This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). The same element in sub. (1m) was held to satisfy the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

9. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: exhibiting or playing a recording, under sec. 948.12(2m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2147 CHILD SEX OFFENDER WORKING WITH CHILDREN — § 948.13

[IF THE UNDERLYING CONVICTION IS FOR VIOLATING § 948.02(2) OR § 948.025, EXCEPTIONS MAY APPLY — SEE § 948.13(2)(b) AND (c)]

Statutory Definition of the Crime

Section 948.13 of the Criminal Code of Wisconsin is violated by a person who has been convicted of a serious child sex offense and who subsequently engages in an occupation or participates in a volunteer position that requires the person to work or interact primarily and directly with children under 16 years of age.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had been convicted of a serious child sex offense. [Identify the serious child sex offense listed in § 948.13(1)(a)] [1] is a serious child sex offense.
2. After being convicted of a serious child sex offense, the defendant [engaged in an occupation] [participated in a volunteer position] that required the defendant (to work) (to interact) primarily and directly with children under 16 years of age.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2147 was originally published in 1996 and the Comment was revised in 1999 and 2003. This revision was approved by the Committee in October 2006 and involved updating footnote 1 to reflect changes made by 2005 Wisconsin Act 277.

This instruction is for a violation of § 948.13, which was created by 1995 Wisconsin Act 265. Act 265 provides that "[t]his act first applies to offenses committed on the effective date of this subsection", which is May 6, 1996. It further provides that this "does not preclude the counting of other offenses as prior serious child sex offenses for determining whether a person is subject to section 948.13(2) . . ."

2001 Wisconsin Act 97 [effective date: May 3, 2002] amended § 948.13 so that (2)(a) begins as follows: "Except as provided in pars. (b) and (c) . . . ." The referenced exceptions relate to defendants who were convicted under § 948.02(2) before the effective date of Act 97 [sub. (b)] or § 948.025 [sub. (c)]. In both situations, the defendant must have been under age 19 at the time of the offense and other criteria specified in sub. (2m) must be satisfied. The Committee concluded that the existence of the exceptions are likely to be determined before trial and are not likely to become issues for a jury to determine.

1999 Wisconsin Act 265 also created § 973.034 which requires that when a person is sentenced for an offense that qualifies as a "serious child sex offense" under § 948.13(1)((a), "the court shall inform the defendant of the requirements and penalties under s. 948.13." The Committee concluded that failure to so inform the defendant would not affect the validity of a criminal charge for violating § 948.13. [See, State v. Phillips, 172 Wis.2d 391, 451 N.W.2d 238 (Ct. App. 1989), reaching the same conclusion with respect to a similar requirement for informing a convicted felon that the felon may not possess a firearm.]

1. Section 948.13(1)(a) lists specific statutes that are "serious child sex offenses" for the purposes of § 948.13. The instruction provides for the insertion of the name of these specifically identified offenses, which are:

- sexual exploitation by therapist under § 940.22, if the victim was under the age of 18;
- second degree sexual assault under § 940.225(2)(c) (victim suffers from a mental illness or deficiency), if the victim was under the age of 18;
- first degree sexual assault of a child under § 948.02(1) (victim has not attained the age of 13 years);
- second degree sexual assault of a child under § 948.02(2) (victim has not attained the age of 16 years);
- repeated acts of sexual assault of the same child under § 948.025(1);
- sexual exploitation of a child under § 948.05(1);
- incest under § 948.06;
- child enticement under subsections (1), (2), (3), and (4) of § 948.07. (Note: subsection (5) and (6) of § 948.07 are not included.);
- use of a computer to facilitate a child sex crime under § 948.075; and,
- sexual assault of a child placed in substitute care under § 948.085.

Note: Reference to sexual assault of a child placed in substitute care under § 948.085 was added to § 948.13(1)(a) by 2005 Wisconsin Act 277.

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In addition to these specifically identified offenses, § 948.13((1)(b) also provides that "[a] crime under federal law or the law of any other state or, prior to the effective date of this paragraph, under the law of this state that is comparable to a crime specified in par. (a)" is a "serious child sex offense." The instruction must be modified if one of these alternatives is used.

2. Subsection (3) of § 948.13 provides as follows:

> Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact primarily and directly with children under 16 years of age: teaching children, child care, youth counseling, youth organization, coaching children, parks or playground recreation or school bus driving.

If it is believed to be helpful or necessary to instruct on this prima facie evidence provision, see Wis JI-Criminal 225, which provides a model for instructing the jury on "presumed facts" and "prima facie cases."

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2148 ABANDONMENT OF A CHILD — § 948.20

Statutory Definition of the Crime

Abandonment of a child, as defined in § 948.20 of the Criminal Code of Wisconsin, is committed by any person who, with intent to abandon the child, leaves any child in a place where the child may suffer because of neglect.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant left (name of child) in a place where the child may have suffered because of neglect.

   "Neglect" means to seriously endanger the health or safety of a child by failing to provide necessary care, food, clothing, medical or dental care, or shelter.[4]

   This does not require that (name of child) actually suffered because of neglect, but it requires only that (name of child) was left in a place where the child may have suffered because of neglect.

3. The defendant left (name of child) with intent to abandon (name of child).

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Meaning of "With Intent To Abandon"

The term "with intent to abandon" requires that the defendant had the purpose to abandon or was aware that (his) (her) conduct was practically certain to cause that result.[5]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2148 was originally published in 1989. This revision was approved by the Committee in April 2003, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

This instruction is for a violation of § 948.20, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.20 replaced § 940.28, 1985-86 Wis. Stats. The only substantive change was to make the statute applicable to all children (persons under the age of 18). Section 940.28 had applied only to children under age 6.

Section 48.195(4) provides "immunity from prosecution under s. 948.20 for abandonment of a child" where a parent relinquishes custody of a child under § 48.195(1). The instruction does not address this provision.

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1. Under prior law, the offense of abandoning a child applied only to children under the age of 6 years. See § 940.28, 1985-86 Wis. Stats. That statute was described as covering "a very special type of conduct — the abandonment of children who are so young that they are unable to care for themselves. It covers cases such as the abandonment of a baby on a doorstep." Comment to § 340.23, 1953 Legislative Council Report on the Criminal Code. The note to new § 948.20 indicates a different conclusion: "The special committee determined that there is no substantial reason for distinguishing between children under the age of 6 and other children for purposes of this offense. Legislative Council note to § 948.20, 1987 Senate Bill 203.

While there may be no reason to make such age distinctions, applying the statute to older children may give more importance to the "intent to abandon" element.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. "Neglect" is not defined in Chapter 948 or elsewhere in the Criminal Code. In the Children's Code, the term "neglected child" has been replaced with a broad category of "children alleged to be in need of protection or services" set forth in § 48.13. That section lists twelve different situations which indicate that a child is in need of protection or services. The definition used in the instruction was adapted from the type of neglect described in § 48.13(10).

5. See § 939.23(3) and Wis JI-Criminal 932A and 923B.

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2150 NEGLECTING A CHILD — § 948.21(2)

Statutory Definition of the Crime

Neglecting a child, as defined in Section 948.21(2) of the Criminal Code of Wisconsin is committed by any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so as to seriously endanger the physical, mental, or emotional health of the child: necessary care, necessary food, necessary clothing, necessary medical care, necessary shelter, education in compliance with section 118.15, protection from exposure to the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as defined in section 961.01(4m), or to drug abuse, as defined in section 46.973(1)(b).[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][2]

2. The defendant was a person responsible for the welfare of (name of child).

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A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3).[3]

3. The defendant, through action or failure to take action, and for reasons other than poverty, failed to provide[4]

[necessary (care)[5] (food) (clothing) (medical care) (shelter).]

[education in compliance with section 118.15.]

[protection from exposure (to the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as defined in section 961.01(4m)) (or) (to drug abuse, as defined in section 46.973(1)(b))].[6]

4. The failure to provide seriously endangered the physical, mental, or emotional health of the child.

To "seriously endanger" means to create a serious risk of harm or injury.[7]

5. The failure to provide was negligent.

"Negligent" means acting, or failing to act, in such a way that a reasonable person would know or should know seriously endangers the physical, mental, or emotional health of a child.[8]

6. [(Name of child)

(suffered death as a consequence).[9]

(suffered great bodily harm as a consequence).[10]

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(became a victim of a child sex offense as a consequence).[11]

(suffered emotional damage as a consequence).[12]

(suffered bodily harm as a consequence).[13]

(had not attained the age of 6 years and the natural and probable consequences of the neglect would be identify a harm specified in § 948.21(3)(a), (b), (c) or (d) although the harm did not actually occur).[14]

(had a physical, cognitive, or developmental disability that was known or should have been known by the defendant and the natural and probable consequences of the neglect would be identify a harm specified in § 948.21(3)(a), (b), (c) or (d) although the harm did not actually occur).[15]]

[The natural and probable consequences of the neglect would be identify a harm specified in § 948.21(3)(a), (b), (c) or (d) although the harm did not actually occur.[16]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2150 was originally published in 1989 and revised in 1995, 2001, and 2009. This revision was approved by the Committee in December 2018.

This is a complete rewrite of the former instruction to reflect the repeal and recreation of § 948.21 by 2017 Wisconsin Act 283 [effective date: April 18, 2018]. The new statute provides penalties for eight

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types of violations – seven felonies and one misdemeanor. The instruction attempts to deal with them by including all options in element 6. Some of the penalties bear a lesser included offense-like relationship to one another. See Wis JI-Criminal 2150A which illustrates how multiple penalties might be addressed.

1. This paragraph is the offense definition provided in § 948.21(2) without change. The Committee recommends striking parts of the definition that do not apply. Element 3 illustrates how the alternatives may be broken down.

2. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

3. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

4. The Committee recommends submitting only the alternatives supported by the evidence; more than one alternative may be submitted.

5. Section § 948.21(1)(c) defines "necessary care" as follows: "care that is vital to the needs of a child's physical, emotional, or mental health based on all of the facts and circumstances bearing on the child's need for care, including the child's age; the child's physical, mental, or emotional condition; and any special needs of the child."

6. Reference to other uniform instructions may be helpful in further defining this element. Distribution of a controlled substance is addressed by Wis JI-Criminal 6020 Delivery Of A Controlled Substance; see Wis JI-Criminal 6020A for delivery of a controlled substance analog. Manufacture of a controlled substance is addressed by Wis JI-Criminal 6021 Manufacture Of A Controlled Substance. Section 46.973(1)(b) defines "drug abuse" as "the use of a drug in such a manner as to endanger the public health, safety or welfare."

7. The definition of "seriously endanger" is adapted from Wis JI-Children 250.

8. This is based on the definition of "negligently" provided in § 948.21(1)(d). The definition of "criminal negligence" in § 939.25, which ordinarily applies when the word "negligently" is used in the Criminal Code, does not apply here. See § 939.25(3).

9. This makes the offense a Class D felony; see § 948.21(3)(a).

10. This makes the offense a Class F felony; see § 948.21(3)(b)1.

11. This makes the offense a Class F felony; see § 948.21(3)(b)2. "Child sex offenses" are specified in § 948.21(1)(a): an offense under s. 948.02, 948.025, 948.05, 948.051, 948.055, 948.06, 948.07, 948.08,

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948.10, 948.11, or 948.12. Refer to the uniform instructions for the elements and definitions applicable to any "child sex offense" that is alleged.

12. This makes the offense a Class G felony; see § 948.21(3)(c). § 948.21(1)(b) provides: "'Emotional damage' has the meaning given in § 48.02(5j)."

13. This makes the offense a Class H felony; see § 948.21(3)(d).

14. This makes the offense a Class I felony; see § 948.21(3)(e)1.

15. This makes the offense a Class I felony; see § 948.21(3)(e)2.

16. This makes the offense a Class A misdemeanor; see § 948.21(3)(f).

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2150A NEGLECTING A CHILD: DEATH, GREAT BODILY HARM, OR BODILY HARM AS A CONSEQUENCE — § 948.21(2)

Statutory Definition of the Crime

Neglecting a child, as defined in Section 948.21(2) of the Criminal Code of Wisconsin is committed by any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so as to seriously endanger the physical, mental, or emotional health of the child: necessary care, necessary food, necessary clothing, necessary medical care, necessary shelter, education in compliance with section 118.15, protection from exposure to the distribution or manufacture of controlled substances, as defined in section 961.01 (4), or controlled substance analogs, as defined in section 961.01 (4m), or to drug abuse, as defined in section 46.973 (1) (b).[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][2]

2. The defendant was a person responsible for the welfare of (name of child).

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A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).[3]

3. The defendant, through action or failure to take action, and for reasons other than poverty, failed to provide[4]

[necessary (care)[5] (food) (clothing) (medical care) (shelter).]

[education in compliance with section 118.15.]

[protection from exposure to (the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as defined in section 961.01(4m)) (or) (drug abuse, as defined in section 46.973 (1) (b))].[6]

4. The failure to provide seriously endangered the physical, mental, or emotional health of the child.

To "seriously endanger" means to create a serious risk of harm or injury.[7]

5. The failure to provide was negligent.

"Negligent" means acting, or failing to act, in such a way that a reasonable person would know or should know seriously endangers the physical, mental, or emotional health of a child.[8]

6. (Name of child)

(suffered death as a consequence).[9]

(suffered great bodily harm as a consequence).[10]

(suffered bodily harm as a consequence).[11]

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This requires that the defendant's action or failure to take action caused (the death of) (great bodily harm to) (bodily harm to) (name of child).

"Cause" means that the defendant's act was a substantial factor in producing the (death) (great bodily harm) (bodily harm).[12]

["Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.)[13]

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.][14]

IF MORE THAN ONE PENALTY-DETERMINING FACT IS SUPPORTED BY THE EVIDENCE, ADD ONE OR BOTH OF THE FOLLOWING AS APPROPRIATE.[15]

If you are not satisfied beyond a reasonable doubt that the defendant's action or failure to take action caused the death of (name of child), you should consider whether the defendant's action or failure to take action caused great bodily harm to (name of child).

If you are not satisfied beyond a reasonable doubt that the defendant's action or failure to take action caused great bodily harm to (name of child), you should consider whether the defendant's action or failure to take action caused bodily harm to (name of child).

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2150A was approved by the Committee in December 2018.

This is a sample instruction for what may be a common situation under § 948.21 – where more than one penalty option may be submitted. It is based on JI 2150, which is a complete rewrite of the former instruction to reflect the repeal and recreation of § 948.21 by 2017 Wisconsin Act 283 [effective date: April 18, 2018].

The recreated statute provides penalties for eight types of violations – seven felonies and one misdemeanor. This instruction attempts to deal with three situations: where death, great bodily harm, or bodily harm is caused. Because the penalties for these violations bear a lesser included offense-like relationship to one another, the instruction may be used for submitting lesser penalties if the evidence supports it. Transitional text is provided in element 6.

1. This paragraph is the offense definition provided in § 948.21(20 without change. The Committee recommends striking parts of the definition that do not apply. Element 3 illustrates how the alternatives may be broken down.

2. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

3. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

4. The Committee recommends submitting only the alternatives supported by the evidence; more than one alternative may be submitted.

5. Section § 948.21(1)(c) defines "necessary care" as follows: "care that is vital to the needs of a child's physical, emotional, or mental health based on all of the facts and circumstances bearing on the

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child's need for care, including the child's age; the child's physical, mental, or emotional condition; and any special needs of the child."

6. Reference to other uniform instructions may be helpful in further defining this element. Distribution of a controlled substance is addressed by Wis JI-Criminal 6020 Delivery Of A Controlled Substance; see Wis JI-Criminal 6020A for delivery of a controlled substance analog. Manufacture of a controlled substance is addressed by Wis JI-Criminal 6021 Manufacture Of A Controlled Substance. Section 46.973(1)(b) defines "drug abuse" as "the use of a drug in such a manner as to endanger the public health, safety or welfare."

7. The definition of "seriously endanger" is adapted from Wis JI-Children 250.

8. This is based on the definition of "negligently" provided in § 948.21(1)(d). The definition of "criminal negligence" in § 939.25, which ordinarily applies when the word "negligently" is used in the Criminal Code, does not apply here. See § 939.25(3).

9. This makes the offense a Class D felony; see § 948.21(3)(a).

10. This makes the offense a Class F felony; see § 948.21(3)(b)1.

11. This makes the offense a Class H felony; see § 948.21(3)(d).

12. The Committee has concluded that the statutory phrase "suffered . . . as a consequence" is equivalent to requiring "cause" as used in most criminal statutes. Wisconsin courts have reached this conclusion with statutes that use the phrases "as a result" or "results in." See State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), and State v. Wille, 2007 WI App 27, 2999 Wis.2d 531, 798 N.W.2d 343.

The Committee has also concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of (death) (great bodily harm) (bodily harm). The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

13. This is the definition of "great bodily harm" provided in § 939.22(14) should apply. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

14. This is the definition of "bodily harm" provided in § 939.22(4).

15. The penalties for violations of § 948.21 causing death, great bodily harm, or bodily harm bear a lesser included offense-like relationship to one another and the Committee concluded that more than one penalty-determining fact could be submitted if the regular lesser included offense evidentiary test is satisfied. The question is, whether the evidence is such that a reasonable jury could find that the fact supporting the higher penalty is not proved beyond a reasonable doubt but could find that the fact supporting the lesser penalty is.

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2151 CHRONIC NEGLECT OF A CHILD; REPEATED ACTS OF NEGLECT — § 948.215

Statutory Definition of the Crime

Section 948.215 of the Criminal Code of Wisconsin is violated by one who commits three or more violations of Section 948.21(2) within a specified period of time involving the same child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed three or more violations of Section 948.21(2) involving the same child.

   Section 948.21(2) of the Criminal Code of Wisconsin is violated by any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so as to seriously endanger the physical, mental, or emotional health of the child: necessary care, necessary food, necessary clothing, necessary medical care, necessary shelter, education in compliance with section 118.15, protection from exposure to the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as

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defined in section 961.01(4m), or to drug abuse, as defined in section 46.973(1)(b).[1]

SPECIFY THE ELEMENTS OF THREE VIOLATIONS OF § 948.21(2) – SEE WIS JI-CRIMINAL 2150. ADD DEFINITIONS AS NECESSARY.

2. At least three violations of Section 948.21(2) involving the same child took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).[2]

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

[More Than Three Acts Alleged]

[Before you may find the defendant guilty you must unanimously agree that at least three violations of Section 948.21 involving the same child occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.][3]

3. [(Name of child)

(suffered death as a consequence).[4]

(suffered great bodily harm as a consequence).[5]

(became a victim of a child sex offense as a consequence).[6]

(suffered emotional damage as a consequence).[7]

(suffered bodily harm as a consequence).][8]

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[The natural and probable consequences of the neglect would be ((identify a harm specified in § 948.215(2)(a), (b), (c), or (d))) although the harm did not actually occur).[9]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2151 was approved by the Committee in December 2018.

This instruction is drafted for violations of § 948.215, created by 2017 Wisconsin Act 283 [effective date: April 18, 2018]. The statute provides penalties for six types of violations – ranging from Class B to Class H felonies. The instruction attempts to deal with them by including all options in element 3.

In requiring repeated criminal acts as the basis for a violation, this offense is similar to those defined in § 948.025, Repeated acts of sexual assault of a child, and § 948.03(5), Repeated acts of physical abuse of a child. See Wis JI-Criminal 2107 and 2114A, respectively.

1. This paragraph is the offense definition provided in § 948.21(2) without change. The Committee recommends striking parts of the definition that do not apply. Element 3 of Wis JI-Criminal 2150 illustrates how the alternatives may be broken down.

2. Here identify the beginning and ending dates of the period specified by the prosecution. For example: "The specified period of time is from June 1, 2018 through September 16, 2018." NOTE: "Specified period of time" also appears in § 948.025, Repeated Acts Of Sexual Assault Of A Child. See note 5, Wis JI-Criminal 2107.

3. This statement is based on § 948.215(3).

4. This makes the offense a Class B felony; see § 948.215(2)(a).

5. This makes the offense a Class D felony; see § 948.215(2)(b)1.

6. This makes the offense a Class D felony; see § 948.215(2)(b)2. "Child sex offenses" are specified in § 948.21(1)(a): an offense under s. 948.02, 948.025, 948.05, 948.051, 948.055, 948.06,

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948.07, 948.08, 948.10, 948.11, or 948.12. Refer to the uniform instructions for the elements and definitions applicable to any "child sex offense" that is alleged.

7. This makes the offense a Class F felony; see § 948.215(2)(c). § 948.21(1)(b) provides: "'Emotional damage' has the meaning given in § 48.02(5j)."

8. This makes the offense a Class F felony; see § 948.215(2)(d).

9. This makes the offense a Class H felony; see § 948.215(2)(e).

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2152 FAILURE TO SUPPORT — § 948.22[1]

Statutory Definition of the Crime

Failure to support, as defined in § 948.22 of the Criminal Code of Wisconsin, is committed by one who intentionally fails for 120 or more consecutive days[2] to provide spousal or child support[3] which the person knows or reasonably should know the person is legally obligated to provide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally failed to provide (spousal) (child) support.[4]

"Intentionally" means that the defendant had the mental purpose to fail to pay support or was aware that his conduct was practically certain to cause that result.[5]

IF THERE IS EVIDENCE THAT THE DEFENDANT FAILED TO PAY SUPPORT REQUIRED UNDER A COURT ORDER,[6] ADD THE FOLLOWING:[7]

[Evidence has been received that the defendant failed to pay support payments required by a court order.

If you are satisfied beyond a reasonable doubt that the defendant knew or reasonably should have known that (he) (she) was required to pay support under a

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court order and failed to pay support payments as required, you may find that the failure to provide support was intentional, but you are not required to do so. You must not find that the failure to support was intentional unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not a defense that support was provided wholly or partially by any other person.][8]

2. The failure to provide support continued for 120 or more consecutive days.[9]

3. The defendant (knew) (reasonably should have known) that (he) (she) was legally obligated to provide the (spousal) (child) support.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2152 was originally published in 1989 and revised in 1993 and 2001. This revision was approved by the Committee in August 2005 and involved updating footnotes 4 and 6..

This instruction is drafted for violations of § 948.22 that do not involve evidence of the affirmative defense provided by sub. (6). For offenses involving the affirmative defense, see Wis JI-Criminal 2152A.

". . . [U]nder § 948.22, Stats., it does not matter that the support owed is an arrearage, when that arrearage accrued or what the current age of the child is. The crime is the intentional failure to pay child support during a 120-day consecutive-day period. Child support is 'an amount which a person is ordered to pay for the support of a child,' and its character is not changed by the passage of time or the name it is given.

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The crime is complete after each 120-day period during which the defendant intentionally fails to pay child support and continues until he or she no longer intentionally fails to pay child support. The statute of limitations begins to run from the end of each 120-day period." State v. Monarch, 230 Wis.2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999).

". . . § 948.22, Stats., criminalizes the failure to pay arrearages even after the child for whom support is ordered attains majority. . . . [I]f a defendant's tax refunds are intercepted and are allocated to a given period, the defendant cannot be said to have failed to provide support for that period." State v. Lenz, 230 Wis.2d 529, 541, 602 N.W.2d 172 (Ct. App. 1999).

1. Failure to support under § 948.22 is a Class E felony if the failure continues for 120 or more consecutive days. (§ 948.22(2).) If the failure is for less than 120 consecutive days, the offense is punished as a Class A misdemeanor. (§ 948.22(3).) Wis JI-Criminal 2152 is drafted for the felony offense. It can be modified for a misdemeanor charge simply by dropping the phrase "for 120 or more consecutive days" wherever it appears and reducing the elements from three to two.

Subsection 948.22(2) has been interpreted to permit "a prosecutor to charge one count of felony nonsupport for each 120-day term a person fails to pay child support, even if that person failed to pay over one continuous period." State v. Grayson, 172 Wis.2d 156, 158 493 N.W.2d 23 (1992). Thus, "if a person fails to pay child support for 360 consecutive days, a prosecutor could charge him with three counts of felony nonsupport." Ibid., at note 1.

2. If the misdemeanor offense is charged, delete the phrase "for 120 or more consecutive days" from this paragraph and in the other places it appears. See discussion in note 1.

3. 1985 Wisconsin Act 56 added "grandchild support" to the statute. "'Grandchild support' means an amount which a person is legally obligated to provide under s. 49.90(1)(a)2 and (11)." Subsec. 948.22(1)(b). In a case involving a grandparent's failure to support, the suggested instruction needs to be modified by substituting "grandchild support" throughout the instruction.

4. The statute uses the terms "spousal" or "child" support and defines them by reference to other statutes using the terms. See subsecs. (1)(a) and (c) of § 948.22. For the purposes of instructing the jury, the Committee concluded that definition of "support" would rarely be necessary in the usual case. Should the facts present an issue, the statutes referenced in subs. (1)(a) and (c) may offer some guidance. But see State v. Smith, 2005 WI 104, 283 Wis.2d 57, 699 N.W.2d 508, quoted in note 6, below. Also see note 3, regarding the revision of the statute to include "grandchild support."

5. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct was practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally." The unusual composition of § 948.22 makes unclear the mental state that is required. With offenses involving the failure to do something, "intentionally" is usually interpreted to require a showing that the defendant be able to do what is required: a failure to do X cannot be "intentionally" done unless the person knew he was supposed to do X and had the ability to do it.

Two provisions of § 948.22 are inconsistent with this definition of "intentionally." Subsec. (4) provides that failure to pay the amount required by court order or an amount equal to that derived from the AFDC

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standards (§ 49.19(11)(a)1) is "prima facie" evidence of intentional failure to provide support. The Committee concluded that the "prima facie" case should be implemented as described in note 6, below.

The second problematical subsection is subsec. (6) which provides that ". . . affirmative defenses include but are not limited to inability to provide child or spousal support." As explained above, the usual definition of "intentionally" requires that there be ability to do that which is required. For a case involving the "affirmative defense," use Wis JI-Criminal 2152A.

6. In State v. Smith, 2005 WI 104, ¶34, 283 Wis.2d 57, 699 N.W.2d 508, the Wisconsin Supreme Court held that "whether a court of competent jurisdiction issued the child support underlying a prosecution for the crime of failure to pay child support is not an element of that crime."

7. Subsection (4) of § 948.22 recognizes two facts as "prima facie evidence" of intentional failure to provide support: failure to make payments required by court order, when the person knows or reasonably should have known that he or she is required to pay support under an order; or, in a situation where there is no court order, failure to pay an amount equal to the AFDC level set forth in § 49.19(11)(a)1, when the person knows or reasonably should have known that he or she has a dependent. The "knows or reasonably should have known" requirements were added to the statute by 1989 Wisconsin Act 212. (The instruction suggests an addition for a case involving a court order. For a case involving the AFDC formula, a similar addition would be necessary.)

The suggested paragraphs attempt to instruct on the effect of a prima facie case in the way required by § 903.03: if the jury finds that the basic fact (failure to pay as required by a court order) exists, it may find that the presumed fact (intentional failure to provide support) exists, but it is not required to do so. Before finding the defendant guilty, the jury must be satisfied beyond a reasonable doubt, from all the evidence, that the failure to support was intentional. See Wis JI-Criminal 225.

An instruction in these terms was approved in State v. Schleusner, 154 Wis.2d 821, 825, 454 N.W.2d 51 (Ct. App. 1990).

8. See § 948.22(5). A comparable provision in the previous version of this statute, § 940.27(6), was discussed in State v. Schleusner, note 7, supra.

Support payments made as a result of the state's interception of tax refunds count as support payments. See State v. Lenz, cited in the Comment preceding note 1, supra.

9. The basic offense is punished as a Class A misdemeanor. The penalty increases to that of a Class E felony if a person fails to provide support "for 120 or more consecutive days." In State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989), the court of appeals interpreted this part of the statute as it applies to an order requiring payment of 25% of income as child support. The court held that the state is not required to prove that the defendant in fact had income for 120 consecutive days where the amount of the support obligation is determined on a percentage basis.

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2152A FAILURE TO SUPPORT: AFFIRMATIVE DEFENSE — § 948.22[1]

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.22(6).][2]

Statutory Definition of the Crime

Failure to support, as defined in § 948.22 of the Criminal Code of Wisconsin, is committed by one who intentionally fails for 120 or more consecutive days[3] to provide spousal or child support[4] which the person knows or reasonably should know the person is legally obligated to provide.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally failed to provide (spousal) (child) support.[5]

"Intentionally" means that the defendant had the mental purpose to fail to pay support or was aware that his conduct was practically certain to cause that result.[6]

IF THERE IS EVIDENCE THAT THE DEFENDANT FAILED TO PAY SUPPORT REQUIRED UNDER A COURT ORDER, ADD THE FOLLOWING:[7]

[Evidence has been received that the defendant failed to pay support payments required by a court order.

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If you are satisfied beyond a reasonable doubt that the defendant knew or reasonably should have known that he was required to pay support under a court order and failed to pay support payments as required, you may find that the failure to provide support was intentional, but you are not required to do so. You must not find that the failure to support was intentional unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not a defense that support was provided wholly or partially by any other person.][8]

2. The failure to provide support continued for 120 or more consecutive days.[9]

3. The defendant (knew) (reasonably should have known) that (he) (she) was legally obligated to provide the (spousal) (child) support.

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant was unable to provide support. The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that (he) (she) was unable to provide support.

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

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[A person may not demonstrate inability to provide support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment, or reduces his earnings or assets.][10]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[11]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you must find the defendant not guilty.[12]

COMMENT

Wis JI-Criminal 2152A was approved by the Committee in May 2000.

This instruction is drafted for violations of § 948.22 involving evidence of the affirmative defense provided by sub. (6). For offenses not involving the affirmative defense, see Wis JI-Criminal 2152.

1. Failure to support under § 948.22 is a Class E felony if the failure continues for 120 or more consecutive days. (§ 948.22(2).) If the failure is for less than 120 consecutive days, the offense is punished as a Class A misdemeanor. (§ 948.22(3).) Wis JI-Criminal 2152 is drafted for the felony offense. It can be

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modified for a misdemeanor charge simply by dropping the phrase "for 120 or more consecutive days" wherever it appears and reducing the elements from three to two.

Subsection 948.22(2) has been interpreted to permit "a prosecutor to charge one count of felony nonsupport for each 120-day term a person fails to pay child support, even if that person failed to pay over one continuous period." State v. Grayson, 172 Wis.2d 156, 158 493 N.W.2d 23 (1992). Thus, "if a person fails to pay child support for 360 consecutive days, a prosecutor could charge him with three counts of felony nonsupport." Ibid., at footnote 1.

2. Subsection (6) of § 948.22 provides as follows:

> 948.22(6) Under this section, affirmative defenses include but are not limited to inability to provide child, grandchild or spousal support. A person may not demonstrate inability to provide child, grandchild or spousal support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets. A person who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

The Committee's decision on how to implement this provision can best be explained by a brief review of affirmative defenses generally, followed by an analysis of the nonsupport statute.

Consideration of affirmative defenses, presumptions (their close relatives), and burdens of production and persuasion can be complicated. But the general rule can be stated quite simply: The legislature has the power to define the conduct that is subject to criminal penalty and in doing so may specify whatever facts it wishes as those necessary to constitute the crime. The burden of persuasion is always on the state to prove these facts beyond a reasonable doubt. If the legislature wishes to identify defenses which are not inconsistent with the facts necessary to constitute the crime, it may do so. On such defenses, the state may impose the burden of persuasion on the defendant.

These statements are the distillation of several decisions of the United States Supreme Court. Specifically, In re Winship, 397 U.S. 358 (1970), is the source of the requirement that the burden is on the prosecution to prove all facts necessary to constitute the crime beyond a reasonable doubt. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court elaborated on Winship, holding that it is a denial of due process to relieve the state of its burden to prove such facts, or shift the burden to the defendant, by presumptions or similar evidentiary devices.

The Winship/Mullaney principles were refined by a later decision in Patterson v. New York, 432 U.S. 197 (1977), which held that those principles extended only to the elements included in the definition of the offense. The state is not required to prove the absence of an affirmative defense, so long as the defense is not inconsistent with the statutory elements of the crime. And it is up to the legislature to determine which facts will be elements and which will be defenses. (The court noted that there are some limits beyond which the legislature may not go but did not identify what those limits are.)

The Patterson decision and its limits on the application of Mullaney and Winship have been followed in subsequent cases. See McMillan v. Pennsylvania, 477 U.S. 79 (1986) — possession of a firearm is a sentencing factor, not an element, and Martin v. Ohio, 480 U.S. 228 (1987) — a defendant charged with

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murder can be required to prove the affirmative defense of self-defense because it is not inconsistent with any of the elements of the crime.

[Note the importance of the change from the broad concept—facts necessary to constitute the crime—used in Winship and, to a lesser degree, in Mullaney to the narrower concept—statutory elements—adopted in Patterson.]

It is now well established that the constitutional principles set forth in Mullaney and Patterson allow the state legislatures to recognize affirmative defenses and to require the defendant to carry the burden of persuasion on such defenses. Wisconsin has generally chosen to stay with a Mullaney type of procedure for most defenses: when there is evidence of a defense in the case, the state must prove its absence to justify a finding of guilt. To put it in Winship terms, the absence of the defense becomes a fact necessary to constitute the crime (though it is not, in Patterson terms, a statutory element). There are exceptions to this approach, however, the most notable being the affirmative defense recognized in § 940.09, Homicide by Intoxicated Use of Vehicle or Firearm. The constitutionality of this affirmative defense has been upheld. State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 1188.

Subsection 948.22(2) makes it a crime to "intentionally" fail to provide support. Subsection 948.22(6) recognizes an affirmative defense — inability to provide support — and provides that the defendant has the burden of proving the defense by a preponderance of the evidence. This drafting style creates a question—is the defense of inability to provide support something that can coexist with the element of intentional failure to pay? If it can, making it an affirmative defense and imposing the burden on the defendant is all right under Patterson. If it cannot, doing so violates the principle of Mullaney.

The former nonsupport statute, § 940.27 (1985-86 Wis. Stats.) also recognized inability to provide support as an affirmative defense but did not explicitly place the burden of persuasion on the defendant. [The suggested uniform jury instruction treated it as imposing only a burden of production on the defendant—once there was evidence of inability to pay support, the state had to prove the defendant did have the ability to pay. See Wis JI-Criminal 1264 © 1986.] The former statute was reviewed in State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989). The court assumed that the defendant did have the burden of persuasion and upheld the constitutionality of the statutory scheme. The court held that because inability to pay does not negate any element of the crime, requiring the defendant to prove it does not unconstitutionally shift any burden to him.

Statutes like new § 948.22 have been reviewed by the U.S. Supreme Court and the U.S. Court of Appeals for the 7th Circuit. In Hicks v. Feiock, 108 S.Ct. 1423 (1988), the U.S. Supreme Court reviewed a California statute that treated failure to pay support as a contempt offense. It was like Wisconsin's statute in that it required intentional failure to pay support but made inability to pay an affirmative defense. The issue before the Court was whether the statute imposed a civil or a criminal penalty. A standard for resolving that question was set forth, and the case was remanded for application of that standard. Not directly addressed was the question whether, if the statute did impose a criminal penalty, it violated due process to require the defendant to prove inability to pay where the intentional failure to pay was an affirmative defense. The state court held that ability to comply was an element of the crime, not an affirmative defense, and that the attempt to make the defendant prove the defense was a due process violation. The Supreme Court concluded it was bound by the state court's determination of this issue and did not analyze it.

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The Indiana nonsupport statute was reviewed by the U.S. Court of Appeals for the 7th Circuit in Davis v. Barber, 853 F.2d 1418 (7th Cir. 1988). Section 35-46-1-5 of the Indiana Code defines criminal nonsupport as "knowingly or intentionally fails to provide support" and provides that "it is a defense that the accused person was unable to provide support." The Seventh Circuit noted that Hicks set the standard to be used in analyzing the statutory scheme: one looks to state law to determine what the elements of the crime are. The court concluded that under Indiana law, ability to pay is not an element. That being the case, due process principles do not prevent making inability to pay an affirmative defense. Further, the court specifically rejected several of the defendant's arguments. First, inability to pay is not the negative side of the requirement that the failure to pay be "intentional" or "knowing." As Indiana law defines those terms, either "conscious objective" or "awareness of a high probability" is sufficient. Inability to pay is not inconsistent with awareness of a high probability that he is failing to provide support. (NOTE: In this respect, the recent change in the definition of "intentionally" under Wisconsin law may save the Wisconsin nonsupport statute—it now includes "mental purpose" and "aware(ness) that the conduct is practically certain to cause the result.") Second, the court rejected the defendant's argument that general principles of criminal liability require that acts be voluntary. Assuming this general rule applies to omissions, the seventh circuit concludes that the general rule is not applicable where a specific statute defines the offense in a contradictory manner.

If one can say that intentional failure to provide support does not require ability to pay, making inability to pay an affirmative defense with the burden of persuasion on the defendant does not violate the due process clause of the U.S. Constitution. Given the decisions in Duprey and in Davis v. Barber, the Committee concluded that the Wisconsin statute is likely to be interpreted as a constitutional definition of the crime of failure to support.

3. If the misdemeanor offense is charged, delete the phrase "for 120 or more consecutive days" from this paragraph and in the other places it appears. See discussion in note 1, supra.

4. 1985 Wisconsin Act 56 added "grandchild support" to the statute. "'Grandchild support' means an amount which a person is legally obligated to provide under s. 49.90(1)(a)2 and (11)." Subsec. 948.22(1)(b). In a case involving a grandparent's failure to support, the suggested instruction needs to be modified by substituting "grandchild support" throughout the instruction.

5. The statute uses the terms "spousal" or "child" support and defines them by reference to other statutes using the terms. See subsecs. (1)(a) and (c) of § 948.22. For the purposes of instructing the jury, the Committee concluded that definition of "support" would rarely be necessary in the usual case. Should the facts present an issue, the statutes referenced in subs. (1)(a) and (c) may offer some guidance. See note 3, supra, regarding the revision of the statute to include "grandchild support."

6. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct was practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally." The unusual composition of § 948.22 makes unclear the mental state that is required. With offenses involving the failure to do something, "intentionally" is usually interpreted to require a showing that the defendant be able to do what is required: a failure to do X cannot be "intentionally" done unless the person knew he was supposed to do X and had the ability to do it.

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Two provisions of § 948.22 are inconsistent with this definition of "intentionally." Subsec. (4) provides that failure to pay the amount required by court order or an amount equal to that derived from the AFDC standards (§ 49.19(11)(a)1) is "prima facie" evidence of intentional failure to provide support. The Committee concluded that the "prima facie" case should be implemented as described in note 7, below.

The second problematical subsection is subsec. (6) which provides that "... affirmative defenses include but are not limited to inability to provide child or spousal support." As explained above, the usual definition of "intentionally" requires that there be ability to that which is required.

7. Subsection (4) of § 948.22 recognizes two facts as "prima facie evidence" of intentional failure to provide support: failure to make payments required by court order, when the person knows or reasonably should have known that he or she is required to pay support under an order; or, in a situation where there is no court order, failure to pay an amount equal to the AFDC level set forth in § 49.19(11)(a)1, when the person knows or reasonably should have known that he or she has a dependent. The "knows or reasonably should have known" requirements were added to the statute by 1989 Wisconsin Act 212. (The instruction suggests an addition for a case involving a court order. For a case involving the AFDC formula, a similar addition would be necessary.)

The suggested paragraphs attempt to instruct on the effect of a prima facie case in the way required by § 903.03: if the jury finds that the basic fact (failure to pay as required by a court order) exists, it may find that the presumed fact (intentional failure to provide support) exists, but it is not required to do so. Before finding the defendant guilty, the jury must be satisfied beyond a reasonable doubt, from all the evidence, that the failure to support was intentional. See Wis JI-Criminal 225.

An instruction in these terms was approved in State v. Schleusner, 154 Wis.2d 821, 825, 454 N.W.2d 51 (Ct. App. 1990).

8. See § 948.22(5). A comparable provision in the previous version of this statute, § 940.27(6), 1985-86 Wis. Stats. was discussed in State v. Schleusner, note 6, supra.

Support payments made as a result of the state's interception of tax refunds count as support payments. See State v. Lenz, cited in the Comment preceding note 1, Wis JI-Criminal 2152.

9. The basic offense is punished as a Class A misdemeanor. The penalty increases to that of a Class E felony if a person fails to provide support "for 120 or more consecutive days." In State v. Duprey, 149 Wis.2d 655, 439 N.W.2d 837 (Ct. App. 1989), the court of appeals interpreted this part of the statute as it applies to an order requiring payment of 25% of income as child support. The court held that the state is not required to prove that the defendant in fact had income for 120 consecutive days where the amount of the support obligation is determined on a percentage basis.

10. This statement is taken directly from subsec. (6) of § 948.22.

A defendant's "lack of financial resources alone is insufficient to demonstrate inability to pay. If a defendant has the capacity to become gainfully employed and realize earnings it is no valid defense to felony nonsupport." State v. Clutter, 230 Wis.2d 472, 479, 602 N.W.2d 324 (Ct. App. 1999).

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Evidence of "incarceration is relevant to a defense of inability because, depending on the circumstances of incarceration, incarceration may prevent a person from being employed and therefore may prevent a person from having earnings with which to pay child support. Whether a person commits a crime in order to avoid paying child support is a question of fact for the jury." State v. Stutesman, 221 Wis.2d 178, 184, 585 N.W.2d 181 (Ct. App. 1998).

11. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

12. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

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2154 CONCEALING THE DEATH OF CHILD — § 948.23(1)(a)

Statutory Definition of the Crime

Concealing the death of a child, as defined in § 948.23(1)(a) of the Criminal Code of Wisconsin, is committed by any person who conceals the corpse of any issue of a woman's body with intent to prevent a determination of whether it was born dead or alive.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant concealed the corpse of any issue of a woman's body.
2. The defendant concealed the corpse with intent to prevent a determination of whether it was born dead or alive.

   "With intent to" means that the defendant had the purpose to prevent a determination of whether the corpse was born dead or alive or was aware that (his) (her) conduct was practically certain to cause that result.[1]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2154 was originally published in 1989 and revised in 2008. This revision was approved by the Committee in July 2012; the comment was updated to reflect 2011 Wisconsin Act 268.

Section 948.23 was amended by 2011 Wisconsin Act 268 [effective date: April 24, 2012]. The offense addressed by this instruction is now found in § 948.23(1)(a). The statute was expanded to cover three new types of conduct: failing to report the death of a child — § 948.23(1)(b); hiding or burying the corpse of a child without authorization — § 948.23(2); and, failure by a parent or guardian to report a child as missing — § 948.23(3). Uniform instructions have not been drafted for these offenses.

Section 948.23 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaced Wis JI-Criminal 1810 which applied to what was essentially the same offense under § 946.63, 1985-6 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332. The revision made one substantive change in what is now sub. (1)(a): it is no longer limited to a woman who conceals the corpse of any issue of her own body. The statute now applies to any person who conceals the corpse of any issue of any woman's body.

1. "With intent to" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version had "mental purpose" as one definition of "with intent to." It is the other alternative that charged from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B.

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2160 ABDUCTION OF ANOTHER'S CHILD: TAKING FROM HOME OR CUSTODY — § 948.30(1)(a)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(1)(a) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose takes any child who is not his or her own by birth or adoption [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant took (name of victim) from [(his) (her) home)] [the custody of (his) (her) (parent) (guardian) (legal custodian)].

   [A child is in custody when the child is in the actual physical custody of (his) (her) (parent) (guardian) (legal custodian), or, if not in the actual physical custody of a (parent) (guardian) (legal custodian), when the (parent) (guardian) (legal custodian) continues to have control of the child.][1]

2. At the time of the alleged taking, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

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Knowledge of (name of victim) 's age is not material[2] and mistake regarding (name of victim) 's age is not a defense.[3]

3. The defendant took the child for an unlawful purpose.

The defendant need not know that (his) (her) purpose was unlawful; it is sufficient if, in fact, the purpose was an unlawful one.[4]

The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime) . (Name of crime) is committed by one who

> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[5]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2160 was originally published in 1989. This revision was approved by the Committee in April 2009; it involved adoption of a new format and changes in how the first and third elements are defined.

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This instruction is for a violation of § 948.30(1)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.30 replaced former § 940.32 with a two-level offense applying only to the taking or detaining of the child of another. The more serious offense requires use of threat or force. See Wis JI-Criminal 2162 and 2163. The limitation to the child of another clears up a potential problem under the old statute, which could have been used against a parent. One of the offenses under the former statute — enticing from the home or custody — was not reenacted.

1. Section 948.30(3) provides:

> (3) For purposes of subs. (1)(a) and (2)(a), a child is in the custody of his or her parent, guardian or legal custodian if:
>
> (a) The child is in the actual physical custody of the parent, guardian or legal custodian; or
> (b) The child is not in the actual physical custody of his or her parent, guardian or legal custodian, but the parent, guardian or legal custodian continues to have control of the child.

2. Section 939.23(6).

3. Section 939.43(2).

4. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

5. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. [**Reporter's Note**: Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

> The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

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2161 ABDUCTION OF ANOTHER'S CHILD: DETAINING AWAY FROM HOME — § 948.30(1)(b)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(1)(b) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose detains any child who is not his or her own by birth or adoption and who is away [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant detained (name of victim) who was away [from (his) (her) home] [from the actual physical custody[1] of (his) (her) (parent) (guardian) (legal custodian)].
2. At the time of the alleged detaining, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

   Knowledge of (name of victim)'s age is not material[2] and mistake regarding (name of victim)'s age is not a defense.
3. The defendant detained the child for an unlawful purpose.

   The defendant need not know that (his) (her) purpose was unlawful; it is sufficient if, in fact, the purpose was an unlawful one.[3]

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The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime). (Name of crime) is committed by one who

> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[4]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2161 was originally published in 1989. This revision was approved by the Committee in June 2009; it involved adoption of a new format and changes in how the first and third elements are defined.

This instruction is for a violation of § 948.30(1)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

See the Comment to Wis JI-Criminal 2160 for an explanation of how the offenses relates to "abduction" under former § 940.32.

1. In place of a definition of "custody," the instruction refers to detaining a child who is away from the "actual physical custody" of the parent, guardian, or custodian. The broader definition of "custody" provided in § 948.30(3) applies only "for purposes of subs. (1)(a) and (2)(a)."

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2. Section 939.23(6).

3. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

4. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. [**Reporter's Note**: Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

> The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

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2162 ABDUCTION OF ANOTHER'S CHILD: TAKING BY FORCE OR THREAT OF FORCE — § 948.30(2)(a)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(2)(a) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose, and by force or threat of imminent force, takes any child who is not his or her own by birth or adoption [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant took (name of victim) from [(his) (her) home] [the custody of (his) (her) (parent) (guardian) (legal custodian)].

   [A child is in custody when the child is in the actual physical custody of (his) (her) (parent) (guardian) (legal custodian), or, if not in the actual physical custody of a (parent) (guardian) (legal custodian), when the (parent) (guardian) (legal custodian) continues to have control of the child.][1]

2. At the time of the alleged taking, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

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Knowledge of (name of victim) 's age is not material[2] and mistake regarding (name of victim) 's age is not a defense.[3]

3. The defendant took the child by force or threat of imminent force.

The term "imminent" means "near at hand" or "on the point of happening."[4]

4. The defendant took (name of victim) for an unlawful purpose.

The defendant need not know that (his) (her) purpose is unlawful; it is sufficient if, in fact, the purpose is an unlawful one.[5]

The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime) . (Name of crime) is committed by one who

> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[6]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2162 was originally published in 1989. This revision was approved by the Committee in April 2009; it involved adoption of a new format and changes in how the first and fourth elements are defined.

This instruction is for a violation of § 948.30(2)(a), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.30 replaces former § 940.32 with a two-level offense applying only to the taking or detaining of the child of another. The more serious offense requires use of threat of force. The limitation to the child of another clears up a potential problem under the old statute, which could have been used against a parent. One of the offenses under the former statute — enticing from the home or custody — is not reenacted. This instruction replaces Wis JI-Criminal 1285 which applied to violations of § 940.32(1) 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

1. Section 948.30(3) provides:

> (3) For purposes of subs. (1)(a) and (2)(a), a child is in the custody of his or her parent, guardian or legal custodian if:
>
> (a) The child is in the actual physical custody of the parent, guardian or legal custodian; or
> (b) The child is not in the actual physical custody of his or her parent, guardian or legal custodian, but the parent, guardian or legal custodian continues to have control of the child.

The Note to this section in 1987 Senate Bill 203, enacted as 1987 Wisconsin Act 332, indicates that this was intended to codify the definition of "custody" in Wis JI-Criminal 1285 and 1286 (© 1986). The same definition has been used in this instruction.

2. Section 939.23(6).

3. Section 939.43(2).

4. The definition is the one used in the instruction for armed robbery [Wis JI-Criminal 1480]; it was originally adapted from the one used in Black's Law Dictionary, p. 884 (4th ed. 1951).

5. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

6. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. [**Reporter's Note**: Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

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If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

> The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

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2163 ABDUCTION OF ANOTHER'S CHILD: DETAINING BY FORCE OR THREAT OF FORCE — § 948.30(2)(b)

Statutory Definition of the Crime

Abduction of another's child, as defined in § 948.30(2)(b) of the Criminal Code of Wisconsin, is committed by one who for any unlawful purpose, and by force or threat of imminent force, detains any child who is not his or her own by birth or adoption and who is away [from the child's home] [from the custody of the child's (parent) (guardian) (legal custodian)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant detained (name of victim) who was away [from (his) (her) home] [from the actual physical custody[1] of (his) (her) (parent) (guardian) legal custodian)].

2. At the time of the alleged detention, (name of victim) was a child under the age of 18 years who was not the defendant's child by birth or adoption.

   Knowledge of (name of victim) 's age is not material[2] and mistake regarding (name of victim) 's age is not a defense.[3]

3. The defendant detained (name of victim) by force or threat of imminent force.

   The term "imminent" means "near at hand" or "on the point of happening."[4]

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4. The defendant detained (name of victim) for an unlawful purpose.

The defendant need not know that (his) (her) purpose is unlawful; it is sufficient if, in fact, the purpose is an unlawful one.[5]

The State alleges that the defendant's unlawful purpose was to commit the crime of (name of crime). (Name of crime) is committed by one who

> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[6]

Deciding About Purpose

You cannot look into a person's mind to find purpose. Purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2163 was originally published in 1989. This revision was approved by the Committee in June 2009; it involved adoption of a new format and changes in how the first and fourth elements are defined.

This instruction is for a violation of § 948.30(2)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or

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after July 1, 1989. It replaces Wis JI-Criminal 1287 which applied to violations of § 940.32(3) 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

See the Comment to Wis JI-Criminal 2162 for an explanation of how this offense relates to "abduction" under former § 940.32.

1. In place of a definition of "custody," the instruction refers to detaining a child who is away from the "actual physical custody" of the parent, guardian, or custodian. The broader definition of "custody" provided in § 948.30(3) applies only "for purposes of subs. (1)(a) and (2)(a)."

2. Section 939.23(6).

3. Section 939.43(2).

4. The definition is the one used in the instruction for armed robbery [Wis JI-Criminal 1480]; it was originally adapted from the one used in Black's Law Dictionary, p. 884 (4th ed. 1951).

5. While the statute does not specifically refer to an intent on the part of the defendant, it does require an unlawful purpose for the act. This is the mental element of the crime and is limited to the requirement that there be an unlawful purpose for the taking.

6. The instruction is drafted for a case where the alleged "unlawful purpose" is a crime. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. [**Reporter's Note**: Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

If an unlawful purpose is alleged that is not a crime, the instruction would need to be changed, using a statement like the following:

> The State alleges that the defendant's unlawful purpose was to (identify the alleged unlawful purpose).

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2166 INTERFERENCE WITH CUSTODY OF A CHILD — § 948.31(1)(b)

Statutory Definition of the Crime

Interference with the custody of a child, as defined in § 948.31(1)(b) of the Criminal Code of Wisconsin, is committed by one who intentionally (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period)[1] from a legal custodian with intent to deprive the custodian of custody rights without the consent of the custodian.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[3]
2. (Name of custodian) had legal custody[4] of (name of child) under a (court order)[5] (judgment) in an action for (specify the type of action).[6]
3. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours beyond the court-approved period of physical placement or visitation period) from (name of custodian) without the consent of (name of custodian).[7]

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"Without consent" means no consent in fact.[8]

The act need not be accompanied by force or violence.

4. The defendant acted intentionally.

"Intentionally" means that the defendant acted with the mental purpose to (cause (name of child) to leave) (take (name of child) away) (withhold (name of child) for more than 12 hours beyond the court-approved period of physical placement or visitation period).

"Intentionally" also requires that the defendant knew that (name of custodian) had legal custody of (name of child) under a (court order) (judgment)[9] and knew that (name of custodian) did not give consent to (cause (name of child) to leave) (take (name of child) away) (withhold (name of child)).

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2166 was originally published in 1989 and revised in 1994, 1997 and 2009. This revision was approved by the Committee in October 2014; it revised the Comment and footnotes.

This instruction is for a violation of § 948.31(1)(b), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1834 which applied to what was essentially the same offense under § 946.71(3), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.31(1)(b), and this instruction, apply to situations where a person interferes with the rights of a child's legal custodian. The Committee concluded that the statute does not apply to a situation where a legal custodian allegedly interferes with rights that a non-legal custodian may have.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

Section 948.31(1)(b) begins with the statement: "Except as provided under chs. 48 and 938. . ." A similar statement preceded the definition of substantive offenses in § 946.71, 1985-86 Wis. Stats. That exclusion is believed to be intended to make it clear that legally authorized placements and interventions under chapters 48 and 938 are not to be considered to be violations of § 948.31(1)(b).

1. Section 948.31(1)(b) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved period of physical placement or visitation period. . ." The Committee interprets this statute as prohibiting <u>any</u> causing to leave, <u>any</u> taking away, and the withholding for more than 12 hours beyond the court-approved period. That is, the "for more than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking.

The 2009 revision added all the statutory alternatives, in parentheses, to the text of the instruction. This was done to avoid the problem that arose in <u>State v. Inglin</u>, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999), where the trial court may have inadvertently failed to completely revise the standard instruction for a "withholding" case. The error was not prejudicial because the court of appeals found the evidence was sufficient to support conviction for "taking away." See note 8, below.

"A defendant causes a child to leave a parent if the defendant is responsible for or brings about an abandoning, departing or going away from the parent. 'Causes to leave' suggests the defendant engages in some sort of mental, rather than physical, manipulation by doing things to persuade the child to leave the parent. Force or violence is unnecessary and the conduct need not be intentional." <u>State v. Bowden</u>, 2007 WI App 234, ¶16, 306 Wis.2d 393, 742 N.W.2d 332. Also see, <u>State v. Samuel</u>, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565.

Section 948.31(1)(b) was amended by 1989 Wisconsin Act 31, section 2836ym, to apply to a "period of physical placement" as well as to visitation periods. The same Act (at section 2836ap) created § 948.01(3m) to provide: "'Physical placement' has the meaning given in § 767.001(5)."

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2. The statutory definition of this offense includes the statement: "This paragraph is not applicable if the court has entered an order authorizing the person to so take or withhold the child." The Committee assumes that court consent is usually a matter of record and can be clearly resolved. In a case where court consent is a factual issue, the Committee concluded that the matter should be treated in the same manner as other statutory exceptions. That is, the matter of court consent need not be included in the criminal complaint and only becomes an issue when it is raised by the evidence. If the issue is raised by the evidence, the state must prove beyond a reasonable doubt that there was no consent by the court. The phrase "or consent of the court" could simply be added at this point and to the third element.

Section 948.31(1)(b) was amended by 1989 Wisconsin Act 31 section 2836ym, to provide a new concluding sentence: "The fact that joint legal custody has been awarded to both parents by a court does not preclude a court from finding that one parent has committed a violation of this paragraph." The same Act (at section 2836ag) created § 948.01(1g) to provide: "'Joint legal custody' has the meaning given in § 767.001(1)."

3. The statute applies to interfering with the custody of any "child," defined in § 948.01(1) as "any person who has not attained the age of 18 years." This is a change from the counterpart offense under prior law, which applied only to children under the age of 14. See § 946.71(4), 1985-86 Wis. Stats.

4. "Legal custodian" is defined as follows in § 948.31(1)(a) (as amended by 1989 Wisconsin Act 31, section 2836(1m):

(a) In this subsection, "legal custodian of a child" means:

1. A parent or other person having legal custody of the child under an order or judgment in an action for divorce, legal separation, annulment, child custody, paternity, guardianship or habeas corpus.

2. The department of children and families or the department of corrections or any person, county department under s. 46.215, 46.22 or 46.23 or licensed child welfare agency, if custody or supervision of the child has been transferred under ch. 48 or 938 to that department, person or agency.

Under former § 946.71, interference with custody transferred under chapter 48 was defined as a separate offense. Section 946.71(1), 1985-86 Wis. Stats.

Wis JI-Criminal 2166 is drafted for a case involving a legal custodian under subsec. (1)(a)1. of the above definition. The Committee interprets that definition as applying to a parent or other person having legal custody under a court order or judgment in one of the specified types of actions. That is, both the "parent" and the "other person" must have custody as a result of court order or judgment.

1989 Wisconsin Act 31, section 2836am, created § 948.01(1r) to provide: "'Legal custody' has the meaning given in § 767.001(2)."

5. In State v.Campbell, 2006 WI 99, 294 Wis.2d 100, 718N.W.2d 649, the court rejected the defendant's claim that the trial court erred when it prevented him from collaterally attacking the custody order on the ground that his wife obtained the order by fraud. The supreme court concluded that "a court may

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permit a collateral attack on a judgment or order procured by fraud if the fraud is jurisdictional, making the judgment or order void, thereby negating an element of a crime, or if the fraud raises an affirmative defense to the crime. Because Campbell's allegations of fraud do not tend to negate any element of a crime and do not constitute an affirmative defense, the circuit court properly excluded evidence of the alleged fraud and prevented Campbell from collaterally attacking the custody order." 2006 WI 99, ¶4.

6. Section 948.31(1) applies to orders resulting from several types of legal proceedings: divorce, legal separation, annulment, custody, paternity, guardianship, or habeas corpus. The applicable term should be specified in the blank provided.

7. Add "or consent of the court" if court consent is raised by the evidence. See discussion in note 2, supra.

8. See § 939.22(48). Where the custodial parent consents to the taking of the child based on the defendant's misrepresentation about the nature of the taking, "public policy calls for treatment of the consent . . . as a nullity." State v. Inglin, 224 Wis.2d 764, 773, 592 N.W.2d 666 (Ct. App. 1999), citing § 939.48(22)(c).

9. The source of the knowledge requirement is § 939.23(3), which provides that whenever the word "intentionally" is used in a criminal statute, "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'."

In State v. Britzke, 108 Wis.2d 675, 683, 324 N.W.2d 289 (Ct. App. 1982), the court of appeals interpreted the prior version of the statute defining this offense. The court held that knowledge of the existence of the court order is sufficient; it is not necessary to prove that the defendant knew the order had the effect of granting "legal custody." [Affirmed on other grounds, 110 Wis. 728, 329 N.W.2d 207 (1983), per curiam.]

The Committee concluded that this means that knowledge of what "legal custody" means is not required. The intent element is satisfied if the defendant knew that the court order existed and knew that it had the effect of transferring the custody of the child. This is consistent with the court's definition of "legal custody" as any custody transferred under a court order (even if that order affects only the "physical custody" of the child).

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2167 INTERFERENCE WITH CUSTODY OF A CHILD — § 948.31(2)[1]

Statutory Definition of the Crime

Interference with the custody of a child, as defined in § 948.31(2) of the Criminal Code of Wisconsin, is committed by one who (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours)[2] from the parents[3] of the child without the consent[4] of the parents.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[5]
2. (Name of parents) were the parents[6] of (name of child).
3. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours)[7] from (name of parents) without their consent.[8]

   "Without consent" means no consent in fact.[9]

   The act need not be accompanied by force or violence.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2167 was originally published in 1989. This revision was approved by the Committee in April 2009; it involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.31(2), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1835 which applied to what was essentially the same offense under § 946.71(4), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

1. Wis JI-Criminal 2167 is drafted for a violation of § 948.31(2) which involves taking a child from the parents. For a case involving a taking from the mother of a nonmarital child, see Wis JI-Criminal 2167A.

2. Section 948.31(2) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours . . ." The Committee interprets this statute as prohibiting <u>any</u> causing to leave, <u>any</u> taking away, and the withholding for more than 12 hours. That is, the "for more than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking. [Note: the "withholding" alternative under this statute does not include a reference to "beyond the court-approved period" that is included in sub. (1)(b) of § 948.31).]

The 2009 revision added all the statutory alternatives, in parentheses, to the text of the instruction. This was done to avoid the problem that arose in <u>State v. Inglin</u>, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999), where the trial court may have inadvertently failed to completely revise the standard instruction for a "withholding" case under § 948.31(1)(b). The error was not prejudicial because the court of appeals found the evidence was sufficient to support conviction for "taking away." See note 9, below.

"A defendant causes a child to leave a parent if the defendant is responsible for or brings about an abandoning, departing or going away from the parent. 'Causes to leave' suggests the defendant engages in some sort of mental , rather than physical, manipulation by doing things to persuade the child to leave the parent. Force or violence is unnecessary and the conduct need not be intentional." <u>State v. Bowden</u>, 2007 WI App 234, ¶16, 306 Wis.2d 393, 742 N.W.2d 332. Also see, <u>State v. Samuel</u>, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565.

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3. Although the statute uses the plural, "parents," it also applies to taking from one parent. See § 990.001(1): "The singular includes the plural, and the plural includes the singular."

4. Section 948.31(2) (as amended by 1989 Wisconsin Act 31, section 2836ym) concludes with the statement: "This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child." The Committee assumes that court consent is usually a matter of record and can be clearly resolved. In a case where court consent is a factual issue, the Committee concluded that the matter should be treated in the same manner as other statutory exceptions. That is, the matter of court consent need not be included in the criminal complaint and only becomes an issue when it is raised by the evidence. If the issue is raised by the evidence, the state must prove beyond a reasonable doubt that there was no consent by the court. The phrase "or consent of the court" could simply be added at this point and to the third element.

5. The statute applies to interfering with the custody of any "child," defined in § 948.01(1) as "any person who has not attained the age of 18 years." This is a change from the counterpart offense under prior law, which applied only to children under the age of 14. See § 946.71(4), 1985-86 Wis. Stats.

6. See note 3, supra.

7. Section 948.31(2) does not require that the acts be done "intentionally." (Compare § 948.31(1)(b) and § 946.71(4), 1985-86 Wis. Stats., which do include "intentionally.") The Committee assumed this was not an inadvertent omission and neither "intentionally" nor any knowledge requirement is included in the instruction. (Compare Wis JI-Criminal 2166 for violations of § 948.31(1)(b).)

8. Add "or consent of the court" if court consent is raised by the evidence. See note 4, supra.

9. See § 939.22(48). Where a parent consents to the taking of the child based on the defendant's misrepresentation about the nature of the taking, "public policy calls for treatment of the consent . . . as a nullity." State v. Inglin, 224 Wis.2d 764, 773, 592 N.W.2d 666 (Ct. App. 1999), citing § 939.48(22)(c).

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2167A INTERFERENCE WITH CUSTODY OF A NONMARITAL CHILD — § 948.31(2)[1]

Statutory Definition of the Crime

Interference with the custody of a child, as defined in § 948.31(2) of the Criminal Code of Wisconsin, is committed by one who (causes a child to leave) (takes a child away) (withholds a child for more than 12 hours)[2] from the (mother of the child) (father of the child, if he has been granted legal custody) without the consent[3] of the (mother) (father) where the child is a nonmarital child whose parents have not intermarried.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[4]
2. (Name of parent) was the (mother) (father who had been granted legal custody) of (name of child).
3. (Name of child) is a nonmarital child.

   A nonmarital child is one who is neither conceived nor born while his or her parents are lawfully married to each other and whose parents have not subsequently married each other.[5]

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4. The defendant (caused (name of child) to leave) (took (name of child) away) (withheld (name of child) for more than 12 hours)[6] from (name of parent) without(his) (her) consent.[7]

"Without consent" means no consent in fact.[8]

The act need not be accompanied by force or violence.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2167A was originally published in 1989. This revision was approved by the Committee in April 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.31(2), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1835A which applied to what was essentially the same offense under § 946.71(4), 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

1. Wis JI-Criminal 2167A is drafted for a violation of § 948.31(2) which involves taking a child from the mother of a nonmarital child or from the father of the child, if he has been granted legal custody. For a case involving a taking of a marital child from the parents, see Wis JI-Criminal 2167.

In State v. Hill, 91 Wis.2d 446, 283 N.W.2d 451 (Ct. App. 1979), the court held that the then-existing version of the statute replaced by § 948.31(1) did not deny equal protection of the laws or due process to fathers of nonmarital children.

2. Section 948.31(2) reads in part as follows: ". . . causes a child to leave, takes a child away or withholds a child for more than 12 hours . . ." The Committee interprets this statute as prohibiting any causing to leave, any taking away, and the withholding for more than 12 hours. That is, the "for more than 12 hours" applies only to the "withholding" alternative, not to the causing to leave or taking. [Note: the

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"withholding" alternative under this statute does not include a reference to "beyond the court-approved period" that is included in sub. (1)(b) of § 948.31).]

The 2009 revision added all the statutory alternatives, in parentheses, to the text of the instruction. This was done to avoid the problem that arose in State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999), where the trial court may have inadvertently failed to completely revise the standard instruction for a "withholding" case under § 948.31(1)(b). The error was not prejudicial because the court of appeals found the evidence was sufficient to support conviction for "taking away." See note 8, below.

"A defendant causes a child to leave a parent if the defendant is responsible for or brings about an abandoning, departing or going away from the parent. 'Causes to leave' suggests the defendant engages in some sort of mental, rather than physical, manipulation by doing things to persuade the child to leave the parent. Force or violence is unnecessary and the conduct need not be intentional." State v. Bowden, 2007 WI App 234, ¶16, 306 Wis.2d 393, 742 N.W.2d 332. Also see, State v. Samuel, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565.

3. Section 948.31(2) (as amended by 1989 Wisconsin Act 31, section 2836ym) concludes with the statement: "This subsection is not applicable if legal custody has been granted by court order to the person taking or withholding the child." The Committee assumes that court consent is usually a matter of record and can be clearly resolved. In a case where court consent is a factual issue, the Committee concluded that the matter should be treated in the same manner as other statutory exceptions. That is, the matter of court consent need not be included in the criminal complaint and only becomes an issue when it is raised by the evidence. If the issue is raised by the evidence, the state must prove beyond a reasonable doubt that there was no consent by the court. The phrase "or consent of the court" could simply be added at this point and to the third element.

4. The statute applies to interfering with the custody of any "child," defined in § 948.01(1) as "any person who has not attained the age of 18 years." This is a change from the counterpart offense under prior law, which applied only to children under the age of 14. See § 946.71(4), 1985-86 Wis. Stats.

5. This definition of "nonmarital child" is based on the one provided in § 990.01(23m). Both the § 990.01(23m) definition and the statement of this offense in § 948.31(2) include the reference: "where parents do not intermarry under s. 767.60." Section 767.60 provides that a nonmarital child becomes a marital child "[i]n any case where the father and mother of any nonmarital child shall enter into a lawful marriage." Since the section apparently applies to any subsequent marriage of the parents of a nonmarital child, there appeared to be no reason to include it in the instruction.

6. Section 948.31(2) does not require that the acts be done "intentionally." (Compare § 948.31(1)(b) and § 946.71(4), 1985-86 Wis. Stats., which do include "intentionally.") The Committee assumed this was not an inadvertent omission and neither "intentionally" nor any knowledge requirement is included in the instruction. (Compare Wis JI-Criminal 2166 for violations of § 948.31(1)(b).)

7. Add "or consent of the court" if there is evidence of court consent in the case. See note 3, supra.

8. See § 939.22(48). Where a parent consents to the taking of the child based on the defendant's misrepresentation about the nature of the taking, "public policy calls for treatment of the consent . . . as a nullity." State v. Inglin, 224 Wis.2d 764, 773, 592 N.W.2d 666 (Ct. App. 1999), citing § 939.48(22)(c).

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2168 INTERFERENCE WITH THE CUSTODY OF A CHILD BY A PARENT OR PERSON ACTING PURSUANT TO THE DIRECTION OF A PARENT: CONCEALING A CHILD[1] — § 948.31(3)(a)

Statutory Definition of the Crime

Interference with the custody of a child by a parent, as defined in § 948.31(3)(a) of the Criminal Code of Wisconsin, is committed by (a parent) (any person acting pursuant to directions from a parent) who intentionally conceals a child from the child's other parent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. On (date of alleged offense), (name of child) had not attained the age of 18 years.[2]

2. (Name of defendant) was (a parent)[3] (acting pursuant to directions from a parent) of (name of child).

3. (Name of defendant) concealed (name of child) from the other parent.

   "Conceal" means to hide the child or do something else which prevents or makes more difficult the discovery of the child by the other parent.[4]

4. The defendant intentionally concealed (name of child).

   This requires that the defendant acted with the purpose[5] to conceal (name of child) from the other parent and to interfere with that parent's custody rights.[6]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2168 was originally published in 1989. This revision was approved by the Committee in April 2009; it involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.31(3), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1838 which applied to what was essentially the same offense under § 946.715, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Affirmative defenses are recognized by subsection (4) of § 948.31. The burden of persuasion is placed on the defendant to establish them by a preponderance of the evidence. See the discussion of the affirmative defense provision in Wis JI-Criminal 2169.

The prior version of this statute, § 946.715, 1985-86 Wis. Stats., is discussed in State v. McCoy, 143 Wis.2d 274, 420 N.W.2d 107 (1988), affirming 139 Wis.2d 291, 407 N.W.2d 319 (Ct. App. 1987).

1. This instruction is drafted for offenses under subsection (3)(a) of § 948.31 whereby one parent intentionally conceals a minor child from the child's other parent. Additional offenses are defined by subsections (3)(b) and (c), for which there are no suggested uniform instructions.

2. See § 948.01(1).

3. The only statutory definition of "parent" is found in § 48.02(13), which reads:

> "Parent" means either a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40, or a parent by adoption. If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.803,

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"parent" includes a person acknowledged under s. 767.805 or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

4. The definition of "conceal" is adapted from the one used in Wis JI-Criminal 1481, Receiving or Concealing Stolen Property.

5. "Intentionally" is defined in § 939.23(3). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one part of the definition. It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

6. The Committee concluded that the essence of this offense, as indicated by the title of the statute, is concealing a child with the purpose of interfering with the custody rights of the other parent — specifically, the right to be with the child and know where the child is.

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2169 INTERFERENCE WITH THE CUSTODY OF A CHILD: AFFIRMATIVE DEFENSES — § 948.31(4)

IF THERE IS EVIDENCE OF AN AFFIRMATIVE DEFENSE RECOGNIZED IN § 948.31(4), SUBSTITUTE THE FOLLOWING FOR THE FINAL TWO PARAGRAPHS OF THE APPLICABLE INSTRUCTION:

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.

If you are satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must consider whether the action taken by the defendant (state the applicable defense as set forth in subsecs. (4)(a)1.-4.).[1]

Wisconsin law provides that it is a defense to this crime if the person took the action (state the applicable defense).[2]

The burden is on the defendant to satisfy you to a reasonable certainty by the greater weight of the credible evidence that (state the applicable defense).

By the greater weight of the evidence is meant evidence which, when weighed against that opposed to it, has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant (state the applicable defense), you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that the defendant (state the applicable defense) and you are satisfied beyond a

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reasonable doubt that all the elements of this offense have been proved, you should find the defendant guilty.

COMMENT

Wis JI-Criminal 2169 was approved by the Committee in August 1989; the comment was updated in 1994. This revision was approved by the Committee in February 2009; it involved adoption of a new format and nonsubstantive changes to the text.

Subsection (4) of § 948.31 recognizes four affirmative defenses to the crime of interference with the custody of a child and imposes the burden of persuasion on the defendant to establish the defense. When there is evidence raising one of the defenses, the instruction for the offense charged must be modified. This instruction illustrates a general format for modifying the final two paragraphs of the instruction on the substantive offense.

Subsection (4) of § 948.31 provides as follows:

(4)(a) It is an affirmative defense to prosecution for violation of this section if the action:

1. Is taken by a parent or by a person authorized by a parent to protect his or her child in a situation in which the parent or authorized person reasonably believes that there is a threat of physical harm or sexual assault to the child;

2. Is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself;

3. Is consented to by the other parent or any other person or agency having legal custody of the child; or

4. Is otherwise authorized by law.

(b) A defendant who raises an affirmative defense has the burden of proving the defense by a preponderance of the evidence.

The defenses stated in sub. (4)(a).1 and 2. were changed by 1993 Wisconsin Act 302, effective date: April 29, 1994. Before the change, subsection (a)1. referred to actions taken to protect the child "from imminent physical harm or sexual assault"; sub. (a)2. referred to a parent fleeing "from imminent physical harm to himself or herself."

The defenses specified in subsecs. (4)(a)1. and 2. appear to be true "affirmative defenses." That is, they describe facts that are not inconsistent with the facts necessary to constitute the crime. However, the defenses specified in subsec. (4)(a)3. and 4. may, at least in some cases, be the same as the statutory elements of the crimes to which they might apply. For example, subsec. (4)(a)3. provides that the consent of the parent is a defense. If applied to the offense defined in § 948.31(2), it would make consent a defense to a crime which has "without consent" as a required element. It violates due process to relieve the state of its burden

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to prove all required elements beyond a reasonable doubt by use of affirmative defenses or presumptions. (See the more extensive discussion of these principles in the Comment to Wis JI-Criminal 2152.) The Committee recommends that the consent defense not be the subject of a special jury instruction in cases involving charges under § 948.31(1)(b) and § 948.31(2) which have "without consent" as an element, at least where the consent issue relates to the consent of one individual. (It could be possible, one supposes, that the charge could be based on taking a child without the consent of the legal guardian and the defense could be raised that the parent consented. In such a case, the elements of the crime and the defense could coexist, avoiding constitutional problems.) The Committee perceives no problem in treating consent as an affirmative defense to charges under § 948.31(3) because "without consent" is not an element of that crime. Similar problems could arise with respect to the "otherwise authorized by law" defense specified in subsec. (4)(a)4. Care should be taken to assure that the defense does not duplicate, and shift the burden of persuasion on, a fact that is already identified by the statute as a fact necessary to constitute the crime.

The former version of one statute replaced by § 948.31 — § 946.715, 1985-86 Wis. Stats. — also recognized defenses that were similar to some of those at issue here. One of those provisions recognized a defense if the action was taken "to protect the child from imminent physical harm." (Compare subsec. (4)(a)1., above.) The constitutionality of that defense was extensively discussed in State v. McCoy, 143 Wis.2d 274, 420 N.W.2d 107 (1988), affirming 139 Wis.2d 291, 407 N.W.2d 319 (Ct. App. 1987). The court held that the phrase "imminent physical harm" was not unconstitutionally vague because "[i]t gives reasonable notice of proscribed conduct to persons bent on obedience of the law and to those who must apply it," 143 Wis.2d 274, 288.

In McCoy, supra, the Wisconsin Supreme Court also held that the legislature intended that a "reasonable person" standard apply to the defense:

> While recognizing that § 946.715, Stats., does not expressly articulate the level of objective or subjective belief a person must hold before the privilege to conceal arises, an analysis of this statute supports a finding that a reasonable person standard was intended. Subsection (1) of the statute evidences the legislature's broad concern for deterrence of parental child snatching, regardless of the marital status of the parents, creating a remedy for the other parent by imposing felony sanctions. Subsection (2) expressly exempts a person from liability when providing protection for minor children who are in danger of imminent physical harm. We conclude that both provisions can only be harmonized by imposing a reasonableness standard on action taken to protect a child from imminent harm.
>
> The language of this statute encourages the maintenance of parental rights against unlawful interruption. A test, as proposed by the defendant, based strictly on subjective belief would vitiate this purpose, permitting a child to be concealed any time harm seemed imminent to a parent, no matter how irrational the belief. This court has determined that an interpretation which fulfills the objectives of a statute is to be favored over an interpretation which would defeat legislative objectives. Belleville State Bank v. Steele, 117 Wis.2d 563, 570, 345 N.W.2d 405, 409 (1984). A subjective standard would not serve the objectives of this statute.

143 Wis.2d 274, 290-91.

Thus, the court concluded that "[l]anguage requiring the defendant's actions to be 'reasonably necessary' . . . properly reflected the treatment of this privilege as a statutory defense." 143 Wis.2d 274, 291.

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For a discussion of the evidence required to raise the affirmative defense, see State v. Inglin, 224 Wis.2d 764, 592 N.W.2d 666 (Ct. App. 1999).

1. Here summarize the applicable defense from subsec. (4)(a)1.-4. For example, for the defense set forth in (4)(a)1., the statement might be completed as follows: ". . . that the parent took the action to protect the child in a situation in which the parent reasonably believed that there was a threat of physical harm to the child."

2. See note 1, supra.

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2170 CONTRIBUTING TO THE DELINQUENCY OF A CHILD — § 948.40(1)

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(1) of the Criminal Code of Wisconsin, is committed by any person who intentionally encourages or contributes to the delinquency of a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child) 's age by the defendant is not required[2] and mistake regarding (name of child) 's age is not a defense.[3]

2. The defendant intentionally encouraged or contributed to the delinquency of (name of child) .

Meaning of "Intentionally Encourage or Contribute"

The term "intentionally encourages or contributes" means that the defendant either had a purpose to encourage or contribute to delinquency or was aware that (his) (her) conduct was practically certain to cause that result.[4]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.[5]

Committing (name crime) violates state criminal law.

The crime of (name crime) is committed by one who

> LIST THE ELEMENTS OF THE INTENDED CRIME AS DEFINED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[6]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not required that the child actually commit a delinquent act. A defendant's conduct contributes to the delinquency of a child if the natural and probable consequences of that conduct would be to cause the child to commit a delinquent act.][7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2170 was originally published in 1989 and revised in 1997, 2001, and 2009. This revision was approved by the Committee in December 2009; it involved adding footnote 1.

This instruction is for a violation of § 948.40, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989, and replaces the delinquency portion of Wis JI-Criminal 1960 which has been withdrawn.

Section 948.40 addresses the delinquency portion of the crime covered by former sec. 947.15, Contributing To The Delinquency Or Neglect Of A Child. The neglect portion is addressed by a separate statute, sec. 948.20.

The basic penalty is that of a Class A misdemeanor. "If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony." Section 948.40(4)(b). If death is a consequence, the penalty is that of a Class D felony. Section 948.40(4)(a). See Wis JI-Criminal 2170A.

This instruction is for an offense under subsection (1) of § 948.40, where the defendant may be any person. Subsection (2) applies where a person responsible for the welfare of a child is alleged to have contributed to the delinquency of a child by disregard of the welfare of the child. See Wis JI-Criminal 2171.

1. A seventeen-year-old is a "child" for purposes of this offense, even though a person of that age would not be a juvenile for purposes of prosecuting the child. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909, 790 N.W.2d 909, affirming, 2009 WI 161, 321 Wis.2d 752, 776 N.W.2d 602.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct is practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally."

5. Section 948.40(1) formerly referred to § 48.02(3m) for the definition of delinquency. That reference was eliminated by 1995 Wisconsin Act 77. "Delinquent" is defined in § 938.02(3m):

> 938.02(3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law. . .

The instruction is drafted for what is expected to be the most common case: where the basis for delinquency is a violation of Wisconsin criminal law.

Only children over the age of 10 can be considered delinquent if they violate a criminal law. However, it is an offense under § 948.40 if a person intentionally encourages or contributes to an act by a child under the age of 10 if that act would be a delinquent act if committed by a child over the age of 10 (§ 948.40(1)). Therefore, the simple definition of "delinquent" in the instruction should be accurate for purposes of this offense.

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6. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. [**Reporter's Note:** Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

The Committee concluded that the jury need not be instructed that they must reach unanimous agreement as to what delinquent act was encouraged, if evidence has been introduced that tends to show more than one. The Wisconsin Court of Appeals reached the same conclusion in a similar situation, holding that unanimity is not required as to which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997). See the Comment to Wis JI-Criminal 517, collecting cases addressing jury unanimity.

Violations of § 948.40 are punished as a Class A misdemeanor unless either death results [see Wis JI-Criminal 2170A] or the child's act encouraged or contributed to is punishable as a felony. The Committee concluded that a jury determination on the felony issue is required because that fact increases the maximum sentence for the crime. See, Apprendi v. New Jersey, 530 U.S. 466 (2000). By specifying a crime in the definition of "delinquency," the instruction assures that a jury verdict of guilty will include a finding that the crime was the felony or misdemeanor specified.

It could be possible that reasonable views of the evidence could differ as to the felony status of the delinquent act. For example, a case could involve a dispute over the value of stolen property; giving the standard theft instruction, including the special question regarding value, would allow the jury to make the required finding. See Wis JI-Criminal 1441.

7. This is the rule stated in subsection (3) of § 948.40, which includes reference to "failure to take action." The instruction's reference to "the defendant's conduct" is intended to cover affirmative acts and failure to act.

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2170A CONTRIBUTING TO THE DELINQUENCY OF A CHILD: DEATH AS A CONSEQUENCE — § 948.40(1), (4)(a)

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(1) of the Criminal Code of Wisconsin, is committed by any person who intentionally encourages or contributes to the delinquency of a child where death is a consequence.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant intentionally encouraged or contributed to the delinquency of (name of child).

3. Death of (name of child)[4] was a consequence of intentionally encouraging or contributing to the delinquency of (name of child).

   This requires that the defendant's contributing to the delinquency of (name of child) was a substantial factor in producing the death of (name of child).[5]

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Meaning of "Intentionally Encourage or Contribute"

The term "intentionally encourages or contributes" means that the defendant either had a purpose to encourage or contribute to delinquency or was aware that (his) (her) conduct was practically certain to cause that result.[6]

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.[7]

Committing (name crime) violates state criminal law.

The crime of (name crime) is committed by one who

> LIST THE ELEMENTS OF THE INTENDED CRIME AS DEFINED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[8]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not required that the child actually commit a delinquent act. A defendant's conduct contributes to the delinquency of a child if the natural and probable consequences of that conduct would be to cause the child to commit a delinquent act.][9]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1989 and was revised in 1997, 2001, 2009, and 2010. This revision was approved by the Committee in December 2010; it involved updating the comment and footnote 1.

This instruction is for a violation of § 948.40, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989, and replaces the delinquency portion of Wis JI-Criminal 1960 which has been withdrawn.

Section 948.40 addresses the delinquency portion of the crime covered by former sec. 947.15, Contributing To The Delinquency Or Neglect Of A Child. The neglect portion is addressed by a separate statute, sec. 948.20.

The basic penalty is that of a Class A misdemeanor. "If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony." Section 948.40(4)(b). If death is a consequence, the penalty is that of a Class D felony. Section 948.40(4)(a).

This instruction is for an offense based on subsection (1) of § 948.40, where the defendant may be any person. Subsection (2) applies where a person responsible for the welfare of a child is alleged to have contributed to the delinquency of a child by disregard of the welfare of the child. See Wis JI-Criminal 2171.

Charging a defendant with violating § 948.40(4)(a) and with first degree reckless homicide under § 940.02(2) is not multiplicitous. The offenses each require proof of a fact that the other does not and there is no evidence that the legislature did not intend multiple punishments. Further, a violation of § 948.40(4)(a) is not "a less serious type of criminal homicide" under § 939.66(2) and thus is not a lesser included offense of first degree reckless homicide. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

1. A seventeen-year-old is a "child" for purposes of this offense, even though a person of that age would not be a juvenile for purposes of prosecuting the child. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

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4. Section 948.40(4)(a) provides that the penalty for contributing to the delinquency of a child increases to that of a Class D felony "if death was a consequence." The same phrase was used in prior law, see § 947.15(1), 1985-86 Wis. Stats. The statutory language does not indicate whether the death must be of the child to whose delinquency the defendant contributes or whether it extends to other persons who are harmed by the child's conduct.

5. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Section 948.40 does not use the word "cause" but rather refers to death being "a consequence." In this respect, it is like several other criminal statutes using "results in" or "as a result" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "as a result" or "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court held that § 346.17(3) was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that he defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

6. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct is practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally."

7. Section 948.40(1) formerly referred to § 48.02(3m) for the definition of delinquency. That reference was eliminated by 1995 Wisconsin Act 77. "Delinquent" is defined in § 938.02(3m):

> 938.02(3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law. . .

The instruction is drafted for what is expected to be the most common case: where the basis for delinquency is a violation of Wisconsin criminal law.

Only children over the age of 10 can be considered delinquent if they violate a criminal law. However, it is an offense under § 948.40 if a person intentionally encourages or contributes to an act by a child under the age of 10 if that act would be a delinquent act if committed by a child over the age of 10 (§ 948.40(1)). Therefore, the simple definition of "delinquent" in the instruction should be accurate for purposes of this offense.

8. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and

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intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. [**Reporter's Note:** Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

The Committee concluded that the jury need not be instructed that they must reach unanimous agreement as to what delinquent act was encouraged, if evidence has been introduced that tends to show more than one. The Wisconsin Court of Appeals reached the same conclusion in a similar situation, holding that unanimity is not required as to which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997). See the Comment to Wis JI-Criminal 517, collecting cases addressing jury unanimity.

9. This is the rule stated in subsection (3) of § 948.40, which includes reference to "failure to take action." The instruction's reference to "the defendant's conduct" is intended to cover affirmative acts and failure to act.

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2171 CONTRIBUTING TO THE DELINQUENCY OF A CHILD BY A PERSON RESPONSIBLE FOR THE CHILD'S WELFARE — § 948.40(2)

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(2) of the Criminal Code of Wisconsin, is committed by any person who is responsible for the child's welfare and who contributes to the delinquency of a child by disregard of the welfare of the child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant was responsible for the welfare of (name of child).

   A "person responsible for the child's welfare" includes (use the appropriate term from § 948.01(3)).[4]

3. The defendant contributed to the delinquency of (name of child) by disregard of the child's welfare.

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.[5]

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Committing (name crime) violates state criminal law.

The crime of (name crime) is committed by one who

LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[6]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not required that the child actually commit a delinquent act. A defendant's conduct contributes to the delinquency of a child if the natural and probable consequences of that conduct would be to cause the child to commit a delinquent act.][7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2171 was originally published in 1989 and revised in 1997, 2001, 2009, and 2010. This revision was approved by the Committee in December 2010; it involved updating footnote 1.

This instruction is for a violation of § 948.40, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989, and replaces the delinquency portion of Wis JI-Criminal 1960 which has been withdrawn.

Section 948.40 addresses the delinquency portion of the crime covered by former sec. 947.15, Contributing To The Delinquency Or Neglect Of A Child. The neglect portion is addressed by a separate statute, sec. 948.20.

The basic penalty is that of a Class A misdemeanor. "If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony." Section 948.40(4)(b). If death is a consequence, the penalty is that of a Class D felony. Section 948.40(4)(a). See Wis JI-Criminal 2170A.

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This instruction is for an offense under subsection (2) of § 948.40, where the defendant must be a person responsible for the welfare of a child. Subsection (1) applies to any person. See Wis JI-Criminal 2170. This instruction replaces Wis JI-Criminal 1961 which has been withdrawn.

1. A seventeen-year-old is a "child" for purposes of this offense, even though a person of that age would not be a juvenile for purposes of prosecuting the child. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authorities relating to "person responsible for the child's welfare."

5. Section 948.40(1) formerly referred to § 48.02(3m) for the definition of delinquency. That reference was eliminated by 1995 Wisconsin Act 77. "Delinquent" is defined in § 938.02(3m):

> 938.02(3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law . . .

Only children over the age of 10 can be considered delinquent if they violate a criminal law. However, it is an offense under § 948.40 if a person intentionally encourages or contributes to an act by a child under the age of 10 if that act would be a delinquent act if committed by a child over the age of 10 (§ 948.40(1)). Therefore, the simple definition of "delinquent" in the instruction should be accurate for purposes of this offense.

6. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)]. [**Reporter's Note:** Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

The Committee concluded that the jury need not be instructed that they must reach unanimous agreement as to what delinquent act was encouraged, if evidence has been introduced that tends to show more than one. The Wisconsin Court of Appeals reached the same conclusion in a similar situation, holding that unanimity is not required as to which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997). See the Comment to Wis JI-Criminal 517, collecting cases addressing jury unanimity. However, the jury must unanimously agree that the child's act was a felony if the felony violation of § 948.40 is charged.

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Violations of § 948.40 are punished as a Class A misdemeanor unless either death results [see Wis JI-Criminal 2170A] or the child's act encouraged or contributed to is punishable as a felony. The Committee concluded that a jury determination on the felony issue is required because that fact increases the maximum sentence for the crime. See, Apprendi v. New Jersey, 530 U.S. 466 (2000). By specifying a crime in the definition of "delinquency," the instruction assures that a jury verdict of guilty will include a finding that the crime was the felony or misdemeanor specified.

It could be possible that reasonable views of the evidence could differ as to the felony status of the delinquent act. For example, a case could involve a dispute over the value of stolen property; giving the standard theft instruction, including the special question regarding value, would allow the jury to make the required finding. See Wis JI-Criminal 1441.

7. This is the rule stated in subsection (3) of § 948.40, which includes reference to "failure to take action." The instruction's reference to "the defendant's conduct" is intended to cover affirmative acts and failure to act.

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2173 CONTRIBUTING TO TRUANCY — § 948.45

Statutory Definition of the Crime

Section 948.45 of the Wisconsin Statutes is violated by any person 17 years of age or older who, by any act or omission, knowingly encourages or contributes to the truancy of a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 17 years.
2. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age is not required and mistake regarding of (name of child)'s age is not a defense.[2]
3. (Name of child) was truant.

   "Truant" means being absent from school for part or all of one or more days during which the school attendance officer, principal, or teacher has not been notified of the legal cause of the absence.[3]
4. The defendant, by any act or omission, knowingly encouraged or contributed[4] to the truancy of (name of child).

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"Knowingly" requires that the defendant knew or believed that the defendant's act or omission would contribute to truancy.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2173 was originally published in 1998. This revision was approved by the Committee in August 2005.

This instruction is drafted for violations of § 948.45(1). Subsection (2) provides: "Subsection (1) does not apply to a person who has under his or her control a child who has been sanctioned under s. 49.26(1)(h)." That reference is to sanctions under the "learnfare" program.

A related offense is defined in § 188.15, Compulsory school attendance. See Wis JI-Criminal 2174.

1. This is the definition of "child" provided in § 948.01(1).

2. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

3. This definition is based on the definition of "truancy" in provided in § 118.16(1)(c), which is expressly cross-referenced in § 948.45(1).

4. Section 948.45(3) provides: "An act or omission contributes to the truancy of a child, whether or not the child is adjudged to be in need of protection or services, if the natural and probable consequences of that actor or omission would be to cause the child to be truant."

5. "'Know' requires only that the actor believes that the specified fact exists." § 939.23(2).

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2174 COMPULSORY SCHOOL ATTENDANCE — § 118.15(1) and (5)

Statutory Definition of the Crime

Section 118.15 of the Wisconsin Statutes is violated by a person who has under (his) (her) control a child between the ages of 6 and 18 years and fails to cause the child to attend school regularly during the full period and hours that the school is in session until the end of the school term, quarter or semester of school year in which the child becomes 18 years of age.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had a child who was between the ages of 6 and 18 years under (his)(her) control.

   This requires that the defendant was a person who had the legal right and duty to control the child, that is, the child's parent or guardian.[1]

2. The defendant failed to cause the child to attend school regularly during the full period and hours that the school is in session until the end of the school term, quarter or semester of school year in which the child becomes 18 years of age.

   "Regularly" means "constantly and uniformly."[2]

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USE THE FOLLOWING CLOSING IF THERE IS NO EVIDENCE OF THE "DISOBEDIENCE" DEFENSE RECOGNIZED IN §118.15(5)(b)2.[3]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

USE THE FOLLOWING CLOSING IF THERE IS EVIDENCE OF THE "DISOBEDIENCE" DEFENSE RECOGNIZED IN §118.15(5)(b)2.[4]

Consider Whether The Defense Is Proved

Wisconsin law provides that it is a defense to this crime if the defendant was unable to comply with the law because of the disobedience of the child.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[5]

Evidence has greater weight when it has more convincing power that the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[6]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

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If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied that both elements of this offense have been proved, you must find the defendant not guilty.[7]

COMMENT

Wis JI-Criminal 2174 was approved by the Committee in August 2005.

This instruction is drafted for violations of § 118.15, Compulsory school attendance. The offense is defined primarily in sub. (1)(a); the penalty is set forth in sub. (5). Extensive exceptions are set forth in subs. (1)(b) to (d) and (4) which are not addressed in the instruction.

A related offense is defined in §948.70, Contributing to truancy. See Wis JI-Criminal 2173.

In State v. White, 180 Wis.2d 203, 509 N.W.2d 434 (Ct. App. 1993), the court of appeals held that § 118.15 was not unconstitutionally vague.

1. State v. McGee, 2005 WI App 97, ¶14, 281 Wis.2d 756, 698 N.W.2d 850.

2. State v. White, 180 Wis.2d 203, 215, 509 N.W.2d 434 (Ct. App. 1993).

3. Section 118.15(5)(b)2. provides that "if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed." If there is evidence of this defense, use the alternative closing provided.

4. Section 118.15(5)(b)2. provides that "if the defendant proves that he or she is unable to comply with the law because of the disobedience of the child, the action shall be dismissed." In State v. McGee, 2005 WI App 97, 281 Wis.2d 756, 698 N.W.2d 850, the court held that "the disobedience exception . . . is an affirmative defense to the charge here and thus should be presented to the fact-finder during the trial for resolution." ¶12. Where there is evidence of this defense in the case, the alternative set of closing paragraphs should be used.

5. Section 118.15(5)(b)2. expressly places the burden of persuasion on the defendant but does not state what that burden is. The Committee concluded that the civil burden of persuasion should apply, as is the case under other criminal statutes that require the defendant to prove a defense.

6. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

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7. Three concluding paragraphs are used to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and,
2) not guilty even though the elements are proven, because the defense has been established.

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2175 CHILD UNATTENDED IN A CHILD CARE VEHICLE — § 948.53

Statutory Definition of the Crime

Section 948.53 of the Criminal Code of Wisconsin is violated by a person responsible for a child's welfare while the child is being transported in a child care vehicle who leaves the child unattended at any time from the time the child is placed in the care of that person to the time the child is placed in the care of another person responsible for the child's welfare.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) was placed in the care of the defendant.

2. (Name of child) was being transported in a child care vehicle.

   "Child care vehicle" means a vehicle that is owned or leased by a child care provider or a contractor of the child care provider and that is used to transport children to and from the child care provider.[1]

   "Child care provider" means [a child care center that is licensed under section 48.65(1)] [a child care provider that is certified under section 48.651] [a child care program that is established or contracted for under section 120.13(14)].[2]

3. The defendant was a person responsible for (name of child)'s welfare[3] while (name of child) was being transported in a child care vehicle.

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4. The defendant left (name of child) unattended before (name of child) was placed in the care of another person responsible for the child's welfare.

5. (Name of child) had not attained the age of 18 years.

[Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.[4]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH A FELONY OFFENSE.[5]

If you find the defendant guilty, you must consider the following question:

"Was (bodily harm) (great bodily harm) (death) a consequence of leaving (name of child) unattended?"

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[6]]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[7]]

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Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that (bodily harm) (great bodily harm) (death) was a consequence of leaving (name of child) unattended?

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2175 was approved by the Committee in July 2012.

This instruction is for violations of§ 948.53. A simple violation is a Class A misdemeanor. The penalty increases to a Class I felony if bodily harm is a consequence; to a Class H felony if great bodily harm is a consequence; and to a Class G felony if death is a consequence. § 948.53(2)(b). If a felony violation is charged, the Committee recommends adding a special question if the evidence would support a finding that the penalty-increasing fact is established.

1. This is the definition provided in § 948.53(1)(b).

2. This is the definition provided in § 948.53(1)(a).

3. The term "person responsible for the child's welfare" is defined in § 948.01(3). It lists categories of persons that the term "includes," the last of which may be most likely to apply to this offense: "a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child."

4. See §§ 939.23(6) and 939.43(2).

5. A simple violation of § 948.53 is a Class A misdemeanor. The penalty increases to a Class I felony if bodily harm is a consequence; to a Class H felony if great bodily harm is a consequence; and to a Class G felony if death is a consequence. § 948.53(2)(b). If a felony violation is charged, the Committee recommends adding a special question if the evidence would support a finding that the penalty-increasing fact is established. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of leaving a child unattended in a child care vehicle under Wis. Stat. § _____, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was (bodily harm) (great bodily harm) (death) a consequence of leaving (name of child) unattended in a child care vehicle?"

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6. This is the definition provided in § 939.22(4).

7. This is the definition provided in § 939.22(14). Also see Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

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2176 POSSESSION OF A DANGEROUS WEAPON BY A CHILD[1] — § 948.60(2)(a)

Statutory Definition of the Crime

Possession of a dangerous weapon by a child, as defined in § 948.60(2)(a) of the Criminal Code of Wisconsin, is committed by any child who possesses or goes armed with a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an object.[2]

   "Possessed" means that the defendant knowingly had the object under (his) (her) actual physical control.[3]

2. The object was a dangerous weapon.

   A _____ is a dangerous weapon.[4]

3. The defendant had not attained the age of 18 years[5] at the time (he) (she) allegedly possessed a dangerous weapon.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

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If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2176 was originally published in 1989 and revised in 1991, 1992, 1998, and 2009. This revision was approved by the Committee in October 2011; it corrected a statutory cross-reference in footnote 4 to reflect a change made by 2011 Wisconsin Act 35.

This instruction is for a violation of § 948.60(2)(a). Section 948.60 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1325 which applied to what was essentially the same offense under § 941.22, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.60 was amended by 1991 Wisconsin Act 18 (see note 4, below) and by 1991 Wisconsin Act 139. The latter divided what was formerly sub. (2) into sub (2)(a) and (b). For violations of § 948.60(2)(b) involving selling a dangerous weapon to a child, see Wis JI-Criminal 2177.

The statute provides an exception for possession by a child in a course of instruction in the traditional and proper use of the weapon under adult supervision. See § 948.60(3)(a). Additional exceptions are recognized in subsections (3)(b) and (c); they were added by 1991 Wisconsin Act 18, effective date: June 8, 1991. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. This instruction is for the offense defined by § 948.60(2)(a) that can be committed only by a child. Section 948.60(2)(d) provides: "A person under 17 years of age who has violated this subsection is subject to the provisions of Ch. 938 unless jurisdiction is waived under s. 938.18 or the person is subject to the jurisdiction of a court of criminal jurisdiction under s. 938.183."

2. The statute applies to any child "who possesses or goes armed with" a dangerous weapon. (Former § 941.22 referred only to "goes armed with.") By adding the alternative of simple possession, the revision appears to make "goes armed with" superfluous. To the extent the two terms have a different meaning, "possess" is the more inclusive one. See the discussion of "goes armed with" in Wis JI-Criminal 1335.

3. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

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"Knowingly" is used because inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see Wis JI-Criminal 6000, Note on the Knowledge Requirement in Controlled Substances Cases.

4. "Dangerous weapon" is specially defined for purposes of this offense; the definition in § 939.22(10) does not apply. Section 948.60(1) provides:

> In this section, "dangerous weapon" means any firearm loaded or unloaded; any electric weapon, as defined in s. 941.295(1c)(a); metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles; a nunchaku or any similar weapon consisting of 2 sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather; a cestus or similar material weighted with metal or other substance and worn on the hand; a shuriken or any similar pointed star-like object intended to injure a person when thrown; or a manrikigusari or similar length of chain having weighted ends.

This definition is essentially a list of seven objects that constitute a dangerous weapon for purposes of this offense. The Committee recommends inserting the name of the object into the instruction rather than reading the complete statutory definition. Note that many items that would qualify as dangerous weapons under § 939.22(10) do not fall within this definition.

The definition was amended by 1991 Wisconsin Act 18 (effective date: June 8, 1991) to substitute "loaded or unloaded" for "having a barrel less than 12 inches long" immediately after the word "firearm" in the first line of the definition.

5. "Child" is defined in this way in § 948.01(1).

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2177 SALE, LOAN, OR GIFT OF A DANGEROUS WEAPON TO A CHILD — § 948.60(2)(b)

Statutory Definition of the Crime

Section 948.60(2)(b) of the Criminal Code of Wisconsin is violated by any person who intentionally sells, loans, or gives a dangerous weapon to a child.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (sold) (loaned) (gave) an object to (name of child).

   "Intentionally" means that the defendant had the purpose to (sell) (loan) (give) an object to (name of child).[1]

2. The object was a dangerous weapon.

   A _____ is a dangerous weapon.[2]

3. The defendant knew that the object was a dangerous weapon.[3]

4. (Name of child) had not attained the age of 18 years[4] at the time the defendant allegedly (sold) (loaned) (gave) (him) (her) a dangerous weapon.

   Knowledge of (name of child)'s age is not required[5] and mistake regarding age is not a defense.[6]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2177 was originally published in 1989 and revised in 1991, 1992 and 2009. This revision was approved by the Committee in October 2011; it corrected a statutory cross-reference in footnote 2 to reflect a change made by 2011 Wisconsin Act 35.

This instruction is for a violation of § 948.60(2)(b). Section 948.60 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1326 which applied to what was essentially the same offense under § 941.22, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.60 was amended by 1991 Wisconsin Act 18 (see note 2, below) and by 1991 Wisconsin Act 139. The latter divided what was formerly sub. (2) into sub. (2)(a) and (2)(b). For violations of § 948.60(2)(a), involving possession of a dangerous weapon by a child, see Wis JI-Criminal 2176.

1991 Wisconsin Act 139 also created sub. (2)(c), which provides that violations of sub. (2)(b) become Class H felonies "if the child under par. (b) discharges the firearm and the discharge causes death to himself, herself, or another." See Wis JI-Criminal 2177A for a suggested instruction for the Class H felony offense.

The statute provides several exceptions. See § 948.60(3) and the discussion preceding note 1, Wis JI-Criminal 2176.

1. "Intentionally" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other alternative that changed from "reasonably believes his act, if successful, will cause that result" to "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

2. "Dangerous weapon" is specially defined for purposes of this offense; the definition in § 939.22(10) does not apply. Section 948.60(1) provides:

> In this section, "dangerous weapon" means any firearm loaded or unloaded; any electric weapon, as defined in s. 941.295(1c)(a); metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles; a nunchaku or any similar weapon consisting of 2 sticks of wood, plastic or metal connected at one end by a length of rope,

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chain, wire or leather; a cestus or similar material weighted with metal or other substance and worn on the hand; a shuriken or any similar pointed star-like object intended to injure a person when thrown; or a manrikigusari or similar length of chain having weighted ends.

This definition is essentially a list of seven objects that constitute a dangerous weapon for purposes of this offense. The Committee recommends inserting the name of the object into the instruction rather than reading the complete statutory definition. Note that many items that would qualify as dangerous weapons under § 939.22(10) do not fall within this definition.

The definition was amended by 1991 Wisconsin Act 18 (effective date: June 8, 1991), to substitute "loaded or unloaded" for "having a barrel less than 12 inches long" immediately after the word "firearm" in the first line of the definition.

3. Section 939.23(3) provides that "intentionally" requires knowledge of all facts necessary to make the conduct criminal and appearing after the word "intentionally" in the statute.

4. "Child" is defined this way in § 948.01(1).

5. Section 939.23(6).

6. Section 939.43(2).

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2177A SALE, LOAN, OR GIFT OF A FIREARM TO A CHILD: DEATH CAUSED — § 948.60(2)(c)

Statutory Definition of the Crime

Section 948.60(2)(c) of the Criminal Code of Wisconsin is violated by any person who intentionally sells, loans, or gives a firearm[1] to a child if the child discharges the firearm and causes death to that child or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (sold) (loaned) (gave) a loaded or unloaded firearm to (name of child).

   "Intentionally" means that the defendant had the purpose to (sell) (loan) (give) a firearm to (name of child).[2]

   The term "firearm" means a weapon that acts by force of gunpowder.[3]

2. (Name of child) had not attained the age of 18 years[4] at the time the defendant allegedly (sold) (loaned) (gave) (him) (her) a firearm.

   Knowledge of (name of child)'s age is not required[5] and mistake regarding age is not a defense.[6]

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3. (Name of child) discharged the firearm and had not attained the age of 18 years at the time.

To "discharge a firearm" simply means to shoot a gun.[7]

4. The discharge of the firearm caused the death of [(name of child)] [another person].

"Cause" means that the discharging of the firearm was a substantial factor in producing the death.[8]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2177A was originally published in 1992. This revision was approved by the Committee in February 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Section 948.60 was amended by 1991 Wisconsin Acts 18 and 139. The latter change created a new felony offense which is addressed by this instruction and applies to offenses committed on or after April 16, 1992. Subsections (2)(b) and (c) provide the penalties:

(2)(b) Except as provided in par. (c), any person who intentionally sells, loans or gives a dangerous weapon to a child is guilty of a Class I felony.
(c) Whoever violates par. (b) is guilty of a Class H felony if the child under par. (b) discharges the firearm and the discharge causes death to himself, herself or another.

See Wis JI-Criminal 2177 for an instruction for the Class I felony offense under (2)(b).

1. "Dangerous weapon" is specially defined for purposes of violations of § 948.60. See § 948.60(1). But because violations of sub. (2)(c) require discharge of a firearm, none of the other alternatives provided in sub. (1) could apply. Thus, the instruction simply refers to "firearm" throughout.

2. "Intentionally" is defined in § 939.23(3). The definition changed effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "intentionally." It is the other

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alternative that changed from "reasonably believes his act, if successful, will cause that result" to "is aware that his or her conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense. Implicit in this element's requirement of purpose is knowledge that the object was a firearm. Section 939.23(3) provides that "intentionally" requires knowledge of all facts necessary to make the conduct criminal and appearing after the word "intentionally" in the statute.

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

4. "Child" is defined in this way in § 948.01(1).

5. Section 939.23(6).

6. Section 939.43(2).

7. This definition is used in instructions for other offenses requiring "discharge" of a firearm. See, for example, Wis JI-Criminal 1322.

8. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it or the acts of two or more persons might jointly produce it.

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2178A POSSESSION OF A FIREARM IN A SCHOOL ZONE — § 948.605(2)(a)

Statutory Definition of the Crime

Possession of a firearm on school grounds, as defined in § 948.605(2) of the Criminal Code of Wisconsin, is committed by any person who knowingly possesses a firearm at a place that the person knows, or has reasonable cause to believe, is in or on the grounds of a school.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly possessed a firearm.

   "Possessed" means that the defendant knowingly had a firearm under (his) (her) actual physical control.[1]

   The term "firearm" means a weapon that acts by the force of gunpowder.[2]

2. The defendant possessed a firearm in or on the grounds of a school.[3]

   ["School" means a public, parochial, or private school or a tribal school which provides an education program for one or more grades between grades 1 and 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school, or high school.][4]

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3. The defendant knew or had reasonable cause to believe that (he) (she) possessed a firearm in or on the grounds of a school.

"Reasonable cause to believe" means that a reasonable person in the defendant's position would have believed that the place where the firearm was possessed was in or on the grounds of a school.

Deciding About Knowledge Or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2178Awas originally published in 1991 and revised in 2009. It was amended in 2012 to reflect changes made by 2011 Wisconsin Act 35. This revision was approved by the Committee in July 2015; it revised the Comment.

This instruction is for a violation of § 948.605(2), created by 1991 Wisconsin Act 17. The statute had an effective date of September 1, 1991 and is a Class I felony. Subsection (3) of § 948.605 makes it a Class G felony to discharge a firearm in a school zone. See Wis JI-Criminal 2178B.

Related offenses are addressed by the following statutes: § 948.61, Dangerous weapons other than firearms on school premises (see Wis JI-Criminal 2179); § 941.20, Endangering safety by use of a dangerous weapon (see Wis JI-Criminal 1305 and 1321-1324); and § 941.23, Carrying a concealed weapon (see Wis JI-Criminal 1335).

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Subsection (2)(b) of § 948.605 sets forth eight situations where the prohibition of sub. (2)(a) does not apply. The exceptions in sub. (2)(b)2d., 2f., and 2h. were created by 2015 Wisconsin Act 23 [effective date: June 26, 2015]. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, the are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

The statutes expressly refers to "knowingly possesses." Even without such reference, "knowingly" would be required because inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see Wis JI-Criminal 6000, Note on the Knowledge Requirement in Controlled Substances Cases.

2. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

3. 2011 Wisconsin Act 35 amended § 948.605(2) to limit the criminal offense to possession of a firearm "in or on the grounds of a school." Offenses "within 1,000 feet of the grounds of a school" are no longer criminal — they are Class B forfeitures (for those without a concealed carry license).

4. This is the definition of "school" provided in § 948.61(1)(b); § 948.605(1)(b) states that it applies to this offense.

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2178B DISCHARGE OF A FIREARM IN A SCHOOL ZONE — § 948.605(3)(a)

Statutory Definition of the Crime

Discharge of a firearm in a school zone, as defined in § 948.605(3) of the Criminal Code of Wisconsin, is committed by any person who knowingly[1] discharges[2] a firearm at a place that the person knows is a school zone.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly[3] discharged a firearm.

   The term "firearm" means a weapon that acts by the force of gunpowder.[4]

   To "discharge a firearm" simply means to shoot a gun.[5]

2. The defendant discharged a firearm in a school zone.

   "School zone" means in or on the grounds of a school (or within 1,000 feet from the grounds of a school).[6]

   ["School" means a public, parochial, or private school which provides an education program for one or more grades between grades 1 and 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school, or high school.][7]

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3. The defendant knew that (he) (she) was in a school zone when (he) (she) discharged a firearm.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2178B was originally published in 1991 and revised in 2009. This revision was approved by the Committee in July 2015; it revised the Comment.

This instruction is for a violation of § 948.605(3), created by 1991 Wisconsin Act 17. The statute had an effective date of September 1, 1991, and is punished as a Class G felony. Subsection (2) of § 948.605 makes it a Class I felony to possess a firearm in a school zone. See Wis JI-Criminal 2178A.

Related offenses are addressed by the following statutes: § 948.61, Dangerous weapons other than firearms on school premises (see Wis JI-Criminal 2179); § 941.20, Endangering safety by use of a dangerous weapon (see Wis JI-Criminal 1305 and 1321-1324); and § 941.23, Carrying a concealed weapon (see Wis JI-Criminal 1335).

Subsection (3)(b) of § 948.605 sets forth seven situations where the prohibition of sub. (3)(a) does not apply. The exceptions in sub. (3)(b)5., 6., and 7. were created by 2015 Wisconsin Act 23 [effective date: June 26, 2015]. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 250 N.W.2d 38 (1951). Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, the are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. The instruction deals only with "knowingly" discharging a firearm. But note that the statute reads in the disjunctive: ". . . knowingly, or with reckless disregard for the safety of another." Since the statute is written in the alternative, the Committee assumed that proof of either alternative is sufficient and that proof of "reckless disregard" is not required in all cases. If that is the case, it seems that the "reckless disregard" alternative would require substantially greater proof than the "knowingly" alternative requires.

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"Recklessness" under the Criminal Code requires that the actor create a substantial and unreasonable risk of death or great bodily harm and that the actor be aware of that risk. See § 939.24. The "knowingly" alternative apparently requires only that the defendant know that he discharged a firearm; no additional risk to others or awareness of such a risk is necessary. That being the case, the Committee expects that all cases would be charged and prosecuted under the "knowingly" alternative.

2. The statute also prohibits "attempts to discharge" a firearm. If an attempt is involved, the instruction would have to be modified accordingly. See Wis JI-Criminal 580 for the general definition of "attempt," which may be useful in developing an instruction for the attempt variety of this offense (which is, of course, punished the same as the completed crime in this instance).

3. See note 1, supra.

4. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns.

5. This definition is used in Wis JI-Criminal 1322.

6. This is the definition of "school zone" provided in § 948.605(1)(b).

7. This is the definition of "school" provided in § 948.61(1)(b); § 948.605(1)(b) states that it applies to this offense.

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2179 DANGEROUS WEAPONS OTHER THAN FIREARMS ON SCHOOL PREMISES — § 948.61

Statutory Definition of the Crime

Section 948.61 is violated by a person who knowingly possesses or goes armed with a dangerous weapon on school premises.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an object.

   "Possessed" means that the defendant knowingly had the object under (his) (her) actual physical control.[1]

2. The object was a dangerous weapon.

   A "dangerous weapon" is (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm).[2]

3. The defendant possessed a dangerous weapon on school premises.

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"School premises" means any school building, grounds, recreation area or athletic field, or any other property owned, used, or operated for school administration.[3]

["School" means a public, parochial, or private school which provides an education program for one or more grades between grades 1 and 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school, or high school.][4]

4. The defendant knew that (he) (she) possessed a dangerous weapon and knew that (he) (she) was on school premises.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2179 was originally published in 1991 and revised in 1994. This revision was approved by the Committee in April 2009; it involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for a violation of § 948.61, which is punished as a Class A misdemeanor if a first offense but as a Class E felony "if the violation is the person's 2nd or subsequent violation of this section within a 5-year period, as measured from the dates the violations occurred." § 948.61(2)(b). This instruction may be used for either the misdemeanor felony offenses. As to the latter, the Committee concluded that the fact of prior conviction need not be submitted to the jury. "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) [emphasis added.]

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Section 948.61 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It was amended by 1991 Wisconsin Act 17, effective date: September 1, 1991. The amendment limited this statute to dangerous weapons other than firearms. The same Act created § 948.605 which prohibits possession of a firearm in a school zone. See Wis JI-Criminal 2178A.

1. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

The statute expressly refers to "knowingly possesses." Even without such reference, "knowingly" would be required because inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

The evidence was found to be sufficient to establish "knowingly possessed" in a prosecution under § 948.61 in In Interest of Michelle A.D., 181 Wis.2d 917, 512 N.W.2d 248 (Ct. App. 1994).

2. Section 948.61(1)(a) provides that "'dangerous weapon' has the meaning specified in § 939.22(10), except 'dangerous weapon' does not include any firearm." The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which, as amended by 2007 Wisconsin Act 127 and excluding "firearm," provides as follows:

> "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

A "BB" air pistol is a "dangerous weapon" under §§ 948.61 and 939.22(10). In Interest of Michelle A.D., 181 Wis.2d 917, 512 N.W.2d 248 (Ct. App. 1994).

See Wis JI-Criminal 910 for discussion of substantive issues relating to "dangerous weapon."

3. This is the definition of "school premises" provided in § 948.61(1)(c).

4. This is the definition of "school" provided in § 948.61(1)(b).

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2180 RECEIVING STOLEN PROPERTY FROM A CHILD — § 948.62

Statutory Definition of the Crime

Receiving stolen property from a child, as defined in § 948.62 of the Criminal Code of Wisconsin, is committed by one who intentionally receives stolen property from a person who has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally received (describe property) from (name of child).

   "Intentionally" requires that the defendant had the mental purpose to receive the property.[1]

   "To receive" means to acquire possession or control over the property.

2. (Name of child) was under the age of 18 years at the time the property was received.

   Knowledge of (name of victim)'s age is not required[2] and mistake regarding (name of victim)'s age is not a defense.[3]

3. The (describe property) was stolen property.[4]

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Property is stolen property when it has intentionally been taken from the owner without consent and with the intent to deprive the owner of its possession permanently.[5]

4. When the property was received, the defendant knew that it was stolen property.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF A FELONY OFFENSE IS CHARGED BASED ON THE PROPERTY BEING A FIREARM, ADD THE FOLLOWING.[8]

[If you find the defendant guilty, answer the following question:

"Was the property a firearm?"

A firearm is a weapon that acts by force of gunpowder.[9]

Answer: "yes" or "no."]

IF A FELONY OFFENSE IS CHARGED, BASED ON THE VALUE OF THE PROPERTY, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE PROPERTY WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

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[Determining Value]

[If you find the defendant guilty, answer the following question:

("Was the value of the property more than $5,000?"

Answer: "yes" or "no.")

("Was the value of the property more than $2,500?"

Answer: "yes" or "no.")

("Was the value of the property more than $500?"

Answer: "yes" or "no.")

"Value" means the market value of the property or the replacement cost, whichever is less.[11] Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value of the property was more than the amount stated in the question.]

COMMENT

Wis JI-Criminal 2180 was originally published in 1989 and revised in 2003. The 2003 revision adopted a new format and reflected changes in the penalties made by 2001 Wisconsin Act 109. This revision was approved by the Committee in February 2012; it reflects changes made by 2011 Wisconsin Act 99 [effective date: December 21, 2011].

Section 948.62 ostensibly prohibits two different kinds of conduct: receiving stolen property from a child and concealing stolen property received from a child. This instruction addresses only the receiving offense but should be sufficient to cover all situations. Because the concealing offense requires that the property has been received from a child, proof of the same basic facts (plus concealing) would seem to be required.

2011 Wisconsin Act 99 [effective date: December 21, 2011] amended § 948.62(1)(bm) to apply the Class H felony penalty to receiving a stolen firearm as well as to property whose value exceeds $2,500.

1. "Intentionally" is defined in § 939.23(3). It includes not only "mental purpose" but also being "aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

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2. Section 939.23(6).

3. Section 939.43(2).

4. The instruction for receiving stolen property in violation of § 943.34 explains this requirement as follows:

> A prior theft or other misappropriation in violation of the Criminal Code is an essential element of the crime. Accordingly, the state must prove beyond a reasonable doubt that the property was stolen property. State v. Godsey, 272 Wis. 406, 75 N.W.2d 572 (1956). The term "stolen" is not defined in the Criminal Code. Necessarily, the term includes all forms of theft covered by § 943.20(1) of the Criminal Code.
>
> Wis JI-Criminal 1481, n. 6.

5. The definition of "stolen property" provided in the instruction is appropriate for the usual case where the property was obtained by theft under § 943.20(1)(a). The standard instruction must be modified if the property was obtained by fraudulent representation or other type of criminal misappropriation.

6. Section 939.23(3) provides that when the word "intentionally" is used in a statute, it requires "knowledge of those facts which are necessary to make the conduct criminal and which are set forth after the word 'intentionally'." Also see, State v. Godsey, 272 Wis. 406, 75 N.W.2d 572 (1956); Oosterwyk v. State, 242 Wis. 398, 8 N.W.2d 346 (1943); Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1956); Meath v. State, 174 Wis. 80, 82, 83, 182 N.W. 334 (1921).

7. Evidence that the defendant was in "unexplained possession of recently stolen property" will often be offered as evidence tending to prove knowledge that the property was stolen. Caution should be exercised in instructing the jury on this issue, see Wis JI-Criminal 173, Circumstantial Evidence — Unexplained Possession of Recently Stolen Property, and the Comment to that instruction.

8. 2011 Wisconsin Act 99 [effective date December 21, 2011] amended § 948.62(1)(bm) to provide that a violation of the statute is a Class H felony "if the property is a firearm." Formerly, the Class H felony penalty applied only if the value of the property exceeded $2,500. The Committee has concluded that addressing these penalty-increasing facts by submitting a special question is the most efficient approach.

9. Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

10. The jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The revised penalties are as follows:

- if the value of the property does not exceed $500, the offense is a Class A misdemeanor;
- if the value of the property exceeds $500 but not $2,500, the offense is a Class I felony;

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- if the value of the property exceeds $2,500 but not $5,000, the offense is a Class H felony; and,
- if the value of the property exceeds $5,000, the offense is a Class G felony.

The questions in the instruction omit the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

11. This is based on the definition provided in § 943.20(2)(d). See note 9, Wis JI-Criminal 1441.

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2185 RECKLESSLY STORING A FIREARM — § 948.55(2)

Statutory Definition of the Crime

Section 948.55(2) of the Criminal Code of Wisconsin is violated by any person who recklessly stores or leaves a loaded firearm within the reach or easy access of a child and the child obtains the firearm without the lawful permission of his or her parent or guardian or the person having charge of the child and the child discharges the firearm and the discharge causes bodily harm or death to himself, herself, or another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant recklessly stored or left a loaded firearm within the reach or easy access of a child.

   "Child" means a person who has not attained the age of 14 years.[1]

   A "firearm" is a weapon that acts by force of gunpowder.[2]

   "Recklessly" means that the defendant's storing or leaving of the firearm created an unreasonable and substantial risk of death or great bodily harm to another human being and the defendant was aware of that risk.[3]

2. A child obtained the firearm without the lawful permission of his or her parent or guardian or the person having charge of the child.

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3. The child discharged the firearm and the discharge caused (bodily harm) (death) to (the child) (another person).[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2185 was approved by the Committee in December 2012.

This instruction is for a violation of subsec. (2) of § 948.55(2)(a), which is punished as a Class A misdemeanor. Subsection 948.55 was created by 1991 Wisconsin Act 139, effective date: April 16, 1992.

Subsections (4)(a) through (h) set forth exceptions to the applicability of § 948.55(2). Also see note 4, below. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1961).

1. Section 948.55(1).

2. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1882). This definition excludes airguns.

3. This is the definition of "criminal recklessness" provided in § 939.24(1). "If criminal recklessness is an element of a crime in Chs. 939 to 951, the recklessness is indicated by the term 'reckless' or 'recklessly.'" Section 939.24(2). Section 948.55(2) uses the term "recklessly."

4. Section 948.55(5) provides that "[s]ubsection (2) does not apply if the bodily harm or death resulted from an accident that occurs while the child is using the firearm in accordance with § 29.304 or 948.60(3)." Section 29.304 relates to parental supervision and hunter education and firearm safety programs for persons under 16 years of age; § 948.60(3) refers to target practice and instruction in proper use of weapons under the supervision of adults. See the Comment preceding note 1, supra, relating to the recommended treatment of such statutory exceptions.

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2196 REGISTERED SEX OFFENDER AND PHOTOGRAPHING MINORS — § 948.14

Statutory Definition of the Crime

Section 948.14 is violated by a person who is required to register under section 301.45 who intentionally captures a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person who was required to register under § 301.45.

   A person who (describe the applicable criterion set forth in subs. (1g) of § 301.45 [1] is required to register.

2. The defendant captured a representation[2] of a minor.

   A minor is an individual who is under 17 years of age.[3]

   "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.[4]

3. The defendant captured the representation of the minor without the written consent of the minor's (parent) (legal custodian) (guardian).

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[The written consent must state the person seeking consent is required to register under § 301.45.][5]

4. The defendant captured the representation intentionally.

This requires that the defendant acted with the purpose to capture the representation of the minor and knew that the minor's parent did not provide written consent.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2196 was approved by the Committee in August 2007.

This instruction is for violations of § 948.14, created by 2005 Wisconsin Act 432. [Effective date: June 6, 2006.]

1. Specify the subsection of § 301.45(1g) that allegedly required the defendant to register as a sex offender.

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2. Section 948.14(1)(c) provides that "'representation' has the meaning given in s. 942.09(1)(c)." That definition states: "'Representation' means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image." "Representation" is not separately defined here; the Committee concluded that it is adequately covered by the definition of "captures a representation" in element 2.

3. See § 948.14(1)(b).

4. This is the definition provided in § 942.09(1)(a), without change. Section 948.14(1)(a) provides that it applies to this offense.

5. Include the sentence in brackets if the case involved evidence of a written consent.

6. The use of "intentionally" requires "a purpose to do the thing or cause the result specified . . . [and] knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'" in the statute. See § 939.23(3). In this statute, that appears to require purpose to capture the representation — as distinguished, for example, from accidentally having a minor in the background of a photo intended to be of something or someone else. And it requires knowledge of "without parent's consent," a fact necessary to make the conduct criminal.

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2198 FAILURE TO COMPLY WITH SEX OFFENDER REGISTRATION REQUIREMENTS — § 301.45

Statutory Definition of the Crime

Section 301.45 of the Wisconsin Statutes is violated by one who knowingly fails to comply with a requirement to provide information under that statute.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person who was required to provide information under section 301.45.

   A person who (describe the applicable criterion set forth in subs. (1g) of § 301.45) [1] is required to provide information under section 301.45.

2. The defendant failed to provide information as required.

   Section 301.45____ provides that persons required to provide information under section 301.45 must (describe the requirement set forth in subs. (2)-(4) of § 301.45) .[2]

3. The defendant knowingly failed to provide the required information.

   This requires that the defendant knew that (he) (she) was required to provide the information.

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Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2198 was approved by the Committee in December 2004. This revision was approved by the Committee in April 2012; it updated the Comment.

This instruction provides a very general model for violations of § 301.45, Sex offender registration. The statute imposes a very detailed and complex set of requirements for persons who have been adjudicated for a sex offense. The key provisions are as follows:

- Those who are covered by the registration requirement are identified in sub. (1g) of § 301.45.
- The requirements for registration and providing information are set forth in subs. (2) to (4) of § 301.45.
- Subsection (6)(a) specifies criminal penalties for "whoever knowingly fails to comply with any requirement to provide information under subs. (2) to (4) . . ."
- Subsection (6)(ag) specifies criminal penalties for "whoever intentionally violates sub. (4r) . . ."
- Subsection (4r) restricts establishing or changing residence without complying with applicable requirements.

The instruction provides a model for violations based on sub. (6)(a): knowingly failing to comply with requirements in subs. (2) to (4). The basis for the defendant's being required to register should be described in element 1; the information that was not provided as required should be described in element 2.

2009 Wisconsin Act 131 created § 301.45(2)(a)6m. to add email accounts, Internet addresses for web sites, etc., to the information that must be provided by those required to register.

The sex offender registration law is not unconstitutional as applied to a defendant convicted of the non-sexual false imprisonment of a minor. False imprisonment in violation of § 940.30 is considered a "sex offense" under § 301.45(1d)(b) if the victim was a minor and the defendant was not the victim's parent.

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Requiring registration in this type of case "is rationally related to a legitimate governmental interest." State v. Smith, 2010 WI 16, ¶40, 323 Wis.2d 377, 780 N.W.2d 90.

In State v. Dinkins, 2012 WI 24, 339 Wis.2d 78, 810 N.W.2d 787, the conviction of a homeless sex offender for failing to provide the address at which he will be residing as required by § 301.45(6) was reversed. The court held:

> . . . we conclude that a registrant cannot be convicted if violating Wis. Stat. § 301.45(6) for failing to report the address at which he will be residing when he is unable to provide this information. We determine that a registrant is unable to provide the required information when that information does not exist, despite the registrant's reasonable attempt to provide it. ¶5.

In State v. Freland, 2011 WI App 80, 344 Wis.2d 722, 800 N.W.2d 18, the court of appeals ruled that the defendant was entitled to withdraw his plea of guilty to a felony charge of failing to provide sex offender information as required by § 301.45(2)(e). The plea was not knowing, voluntary, or intelligent because he was not aware that the out-of-state conviction on which the registration requirement was based was eligible to be treated as a misdemeanor under § 301.45(6).

1. Subsection (1g) lists the categories of persons who are subject to the requirements of § 301.45. The applicable category should be used in the blank in element 1. For example, "A person who was convicted for a sex offense after December 25, 1993, is required to provide information under section 301.45." Offenses that are "sex offenses" are listed in § 301.45(1d)(b).

2. Specify the subsection of § 301.45 that is involved in the case and describe the requirement that was allegedly violated.

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2300 INQUEST: PRELIMINARY INSTRUCTION

You have been summoned to serve as jurors at the inquest into the death of (name of deceased) to determine when, in what manner, and by what means (name of deceased) died.[1]

The district attorney will make a brief opening statement to acquaint you with the circumstances of (name of deceased)'s death. After the district attorney's statement, you will hear the testimony of sworn witnesses and examine various courtroom exhibits.

It is your duty to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony.

In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.[2]

You may find that the testimony of one witness is entitled to greater weight than that of another witness, or even of several other witnesses, and you may give it such weight in considering your verdict.[3]

In determining the weight and credit you should give to the testimony of each witness, you should consider interest or lack of interest in the result of this inquest, conduct, appearance, and demeanor on the witness stand, bias or prejudice, if any has been shown, the clearness or lack of clearness of recollections, the opportunity for observing and knowing the matters and things testified to by the witness and the reasonableness of the testimony.

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You should also take into consideration the apparent intelligence of each witness, the possible motives for falsifying, and all other facts and circumstances which tend either to support or to discredit the testimony, and then give to the testimony of each witness such weight and credit as you believe its is fairly entitled to receive.[4]

After all the evidence is presented, you will be asked to answer a series of questions and return your verdict as to when, in what manner, and by what means (name of deceased) died.

Your verdict must be based only on the evidence presented and the law given to you by the court. Do not let any personal feelings of bias or prejudice about such things as race, religion, national origin, sex, or age affect your deliberations. Consider the testimony and the exhibits, and listen to the court's instructions concerning the law to be applied to facts of the case. Your verdict will be considered by the district attorney in determining whether criminal charges should be filed.

Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until you deliberate in the jury room. If you come in contact with the district attorney, witnesses, or relatives of the deceased, do not speak with them. Do not listen to any conversations about this case.[5]

[ADD WIS JI-CRIMINAL 55, NOTETAKING PERMITTED, OR WIS JI-CRIMINAL 56, NOTETAKING NOT ALLOWED.]

[ADD WIS JI-CRIMINAL 57 IF THE JURORS WILL BE ALLOWED TO ASK QUESTIONS.]

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You will not have a copy of the written transcript of the inquest testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced at the inquest.[6]

COMMENT

Wis JI-Criminal 2300 was originally published in 1998. This revision was approved by the Committee in June 2009. It adopted a new format and did not make any substantive changes.

This instruction is recommended for use before the presentation of evidence begins at an inquest and is intended to give the jurors a general idea of their duties and how the inquest will proceed.

Any other standard instructions may be added that may appear to be helpful or appropriate. Any that are added should be reviewed to assure that they do not contain a reference to "trial" or "beyond a reasonable doubt."

Final instructions and suggested verdict forms are provided in Wis JI-Criminal 2302.

1. This phrase is adopted from the juror's oath provided in § 979.05(4):

> You do solemnly swear (affirm) that you will diligently inquire and determine on behalf of the state when, and in what manner and by what means, the person known as . . . . . who is now dead came to his or her death and that you will return a true verdict thereon according to your knowledge, according to the evidence presented and according to the instructions given to you by the . . . . (judge) (court commissioner).

2. This is based on Wis JI-Criminal 195, Juror's Knowledge.

3. This is based on Wis JI-Criminal 190, Weight of Evidence.

4. The preceding three paragraphs are based on Wis JI-Criminal 300, Credibility of Witnesses.

5. Portions of the preceding two paragraphs are based on Wis JI-Criminal 50, Preliminary Instruction on Jurors' Conduct, modified for use in the context of an inquest jury.

6. This paragraph is the text of Wis JI-Criminal 58, Transcript Not Available for Deliberations; Reading Back Testimony. Its purpose is to correct any misimpressions jurors may have about the immediate availability of written transcripts of the inquest testimony. The second sentence is in brackets to emphasize that it is not intended to encourage jury requests for reading back testimony and to indicate that its use is within the court's discretion.

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2302 INQUEST: FINAL INSTRUCTIONS: EXPLANATION OF VERDICTS

Members of the jury, this case will now be submitted to you in the form of a special verdict consisting of _____ questions. Your duty is to answer those questions which, according to the evidence and my instructions, it becomes necessary for you to answer to arrive at a completed verdict.[1]

Question 1 asks: Is there probable cause to believe that the death of (name of deceased) was caused under circumstances constituting (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes?[2]

If you answer question 1 "yes," answer question 2. Question 2 asks: Is there probable cause to believe that (name person) committed the offense of (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes, in causing the death of (name of deceased)?[3]

If you answer question 1 "no," answer question 3. Question 3 asks: Is there probable cause to believe that the death of (name of deceased) was a result of [natural causes] [an accident] [suicide] [an act privileged by law]?[4]

All three questions require you to apply the standard of "probable cause."

There is probable cause if the facts and circumstances would cause a cautious and prudent person to reasonably believe that a certain fact situation exists. Probable cause is more than mere suspicion, but the evidence necessary to support a finding of probable cause need not satisfy you beyond a reasonable doubt.[5]

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Question 1 asks you to determine whether there is probable cause to believe that the death of (name of deceased) was caused under circumstances constituting (name of offense submitted to the jury).[6]

DEFINE THE OFFENSE OR OFFENSES TO BE SUBMITTED TO THE JURY; WIS JI-CRIMINAL 1010 THROUGH 1191 ADDRESS HOMICIDE OFFENSES.

Question 3 asks you to determine whether there is probable cause to believe that the death of (name of deceased) was a result of [natural causes] [an accident] [suicide] [an act privileged by law].

["Accident" means that the death was caused by other than criminal means. The possible criminal causes of death that apply to this case were defined in connection with question 1.][7]

["Suicide" means the voluntary and intentional taking of one's own life."][8]

["An act privileged by law" as it applies in this case requires you to consider the privilege of (identify applicable privilege).][9]

[ADD INSTRUCTION ON THE APPLICABLE PRIVILEGE; SEE WIS JI-CRIMINAL 800 THROUGH 885.]

In answering the questions provided in the verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence. You are to search for the truth.[10]

Your verdict will be advisory, which means that it will be a recommendation to the district attorney whether criminal charges should be filed against any person arising out of the circumstances of (name of deceased)'s death.

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Before you may return a verdict which may legally be received, the verdict must be reached unanimously. All the jurors must agree.[11]

When you retire to the jury room, select one of your members to preside over your deliberations. His or her vote is entitled to no greater weight than the vote of any other juror.

When you have agreed upon your verdict, all of you must sign it and it should be dated by the person you have selected to preside.

Swear the officer.

COMMENT

Wis JI-Criminal 2302 was originally published in 1998. This revision was approved by the Committee in June 2009. It adopted a new format and did not make any substantive changes.

This is suggested as the final instruction to the inquest jury and is specifically keyed to the verdict questions the jury will be asked to answer. See Wis JI-Criminal 2302A for the suggested verdict questions. A preliminary instruction to the inquest jury is provided in Wis JI-Criminal 2300.

1. This statement is based on Wis JI-Civil 100, Opening.

2. Section 979.08(1) provides that "[t]he instructions shall include those criminal offenses for which the judge or court commissioner believes a reasonable jury might return a verdict based upon a finding of probable cause." Thus, if supported by the evidence, instructions on more than one offense may be required. If that is the case, the Committee recommends submitting additional questions in essentially the same form as question 1, specifying a different offense and including a definition of that offense.

3. The model is set up for the simple case where one person is being considered as the person who committed the crime. If more than one person is being considered, the Committee recommends adding a separate question for each person.

4. The model is drafted to provide for the selection of the one of the alternatives. If more than one of the alternatives is raised by the evidence, the Committee suggests adding questions for each one.

5. Section 979.08(2) provides that the inquest jury's verdict "shall be based upon a finding of probable cause."

6. Instructions on more than one offense may be necessary. See note 1, supra.

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7. Section 979.08(3)(b) uses the term "accident" which has no formal meaning in the law of Wisconsin. The Committee concluded that it is best defined as a death resulting from other than criminal means. The criminal means that may apply to the case will have been defined for the jury in connection with question 1. If those criminal means do not apply, the jury should find that the death resulted from an "accident."

8. The definition of "suicide" is the one provided in Wis JI-Criminal 1195, Assisting Suicide.

9. The privileges most likely to apply are self-defense — see Wis JI-Criminal 800 through 820; defense of others — see Wis JI-Criminal 825 and 830; and the law enforcement officer's privilege to use deadly force — see Wis JI-Criminal 885. The applicable instruction should be adapted for use here.

10. This paragraph consists of the first and last sentences of Wis JI-Criminal 140, Burden of Proof and Presumption of Innocence.

11. Section 979.08(2) provides: "The jury's verdict shall be based upon a finding of probable cause and shall be unanimous." The instruction is based on Wis JI-Criminal 515, Unanimous Verdict and Selection of Presiding Juror.

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2302A INQUEST: SUGGESTED VERDICTS

We, the undersigned jurors, find as follows:

1. Is there probable cause to believe that the death of (name of deceased) was caused under circumstances constituting (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes?[1]

Yes _____ No _____

Answer question 2 only if you answer question 1 "yes."

2. Is there probable cause to believe that the following person committed the offense of (name of offense submitted to the jury), contrary to section _____ of the Wisconsin Statutes, in causing the death of (name of deceased) ?[2]

_____(Name person)_____.

Yes _____ No _____

Answer question 3 only if you answer question 1 "no."

3. Is there probable cause to believe that the death of (name of deceased) was a result of [natural causes] [an accident] [suicide] [an act privileged by law]?[3]

Yes _____ No _____

We, the undersigned jurors, state that we are unanimous as to each question in the verdict, and the verdict is signed by each of us. Dated at _____, Wisconsin, this _____ day of _____, 20__.

_____ _____

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_____ _____

_____ _____

Validated and signed this _____ day of

_____, 20__.

_____

(Name of judge), Circuit Court Judge

COMMENT

Wis JI-Criminal 2302A was originally published in 1998. This revision was approved by the Committee in June 2009. It adopted a new format and did not make any substantive changes.

This provides a suggested form for verdict questions submitted to the inquest jury. Instructions explaining the questions are provided in Wis JI-Criminal 2302.

Section 979.08(3) specifies the form of the verdict:

> . . . The verdict shall be in a form which permits the following findings:
>
> (a) Whether the deceased came to his or her death by criminal means and, if so, the specific crimes committed and the name of the person or persons, if known, having committed the crimes.
>
> (b) Whether the deceased came to his or her death by natural causes, accident, suicide or an act privileged by law.

1. Section 979.08(1) provides that "[t]he instructions shall include those criminal offenses for which the judge or court commissioner believes a reasonable jury might return a verdict based upon a finding of probable cause." Thus, if supported by the evidence, instructions on more than one offense may be required. If that is the case, the Committee recommends submitting additional questions in essentially the same form as question 1, specifying a different offense and including a definition of that offense.

2. The model is set up for the simple case where one person is being considered as the person who committed the crime. If more than one person is being considered, the Committee recommends adding a separate question for each person.

3. The model is drafted to provide for the selection of the one of the alternatives. If more than one of the alternatives is raised by the evidence, the Committee suggests adding questions for each one.

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2500 SUGGESTED ORDER OF INSTRUCTIONS: COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

The following is a suggested order of instructions for proceedings under Chapter 980, Sexually Violent Persons Commitments. It is based on the list provided in Wis JI-Criminal 1. Most of the instructions may be given without change. Those that need to be changed appear in boldface. Drafts of those instructions are included here, with the changed material also indicated in boldface.

2501 Preliminary Instruction: Commitment As A Sexually Violent Person Under Chapter 980, Wis. Stats.

50 Preliminary Instruction: Juror's Conduct; Evidence; Transcripts Not Available; Credibility; Substantive Issues; Opening Statement
55 Notetaking Permitted
57 Instruction on Juror Questioning of Witnesses
58 Transcripts Not Available for Deliberations; Reading Back Testimony
100 Opening Instructions [modified]

2502 Commitment As A Sexually Violent Person Under Chapter 980, Wis. Stats.

103 Evidence Defined
147 Improper Questions
148 Objections of Counsel; Evidence Received Over Objection
150 Stricken Testimony
154 Summary of Evidence
155 Exhibits
157 Remarks of Counsel
160 Closing Arguments of Counsel
162 Agreed Facts [modified]
165 Judicially Noticed Facts
180 Statements of Defendant [modified]
190 Weight of Evidence
195 Juror's Knowledge
200 Expert Testimony: General
201 Opinion of Non-Expert Witness

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205 Expert Testimony: Hypothetical Question
300 Credibility of Witnesses [modified]
315 Respondent Elects Not To Testify [TO BE GIVEN ONLY IF REQUESTED BY RESPONDENT] [modified]
325 Impeachment of Witness: Prior Conviction or Juvenile Adjudication
330 Impeachment of Witness: Character For Truthfulness
460 Closing Instruction [modified]
515 Unanimous Verdict and Selection of Presiding Juror [modified]

2503 Verdict: Commitment As A Sexually Violent Person Under Chapter 980, Wis. Stats.
525 Instruction After Verdict Received

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Following are the instructions that need to be modified for a Chapter 980 case.

COMMENT

Wis JI-Criminal 2500 was originally published in 2011 and revised in 2014. This revision was approved by the Committee in October 2015; it reflected a change in the title of Wis JI-Criminal 180.

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100 OPENING INSTRUCTIONS [modified]

Members of the jury:

The court will now instruct you upon the principles of law which you are to follow in considering the evidence and in reaching your verdict.

It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict.

If any member of the jury has an impression of my opinion as to whether **or not the respondent is a sexually violent person**, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

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162 AGREED FACTS [modified]

[IF THE AGREED FACTS GO TO AN ELEMENT OF THE CRIME, A PERSONAL WAIVER BY THE DEFENDANT IS REQUIRED.]

The **parties** have stipulated or agreed to the existence of certain facts, and you must accept these facts as conclusively proved. (In this case, the **parties** have stipulated to the following facts:)

[state the agreed facts]

180 STATEMENTS OF RESPONDENT

The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the **respondent**. It is for you to determine how much weight, if any, to give to (the) (each) statement.

In evaluating (the) (each) statement, you must determine three things:

- whether the statement was actually made by the **respondent**. Only so much of a statement as was actually made by a person may be considered as evidence.
- whether the statement was accurately restated here at trial.
- whether the statement or any part of it ought to be believed.

You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

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300 CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

[GIVE THE FOLLOWING PARAGRAPH ONLY WHEN THE **RESPONDENT** TESTIFIES.]

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[The **respondent** has testified in this case, and you should not discredit the testimony just because the **respondent** is **the subject of a petition for commitment**. Use the same factors to determine the credibility and weight of the **respondent**'s testimony that you use to evaluate the testimony of any other witness.]

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

315 RESPONDENT ELECTS NOT TO TESTIFY

[TO BE GIVEN ONLY IF REQUESTED BY **RESPONDENT**.]

The respondent has the right not to testify **in this proceeding**.

The **respondent**'s decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

460 CLOSING INSTRUCTION

Now, members of the jury, the duties of counsel and the court have been performed. The case has been argued by counsel. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors, selected for this important duty. You will not be swayed by sympathy,

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prejudice, or passion. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duty steadfastly in mind and, as upright citizens, to render a just and true verdict.

You are to decide only whether **or not** the **respondent is a sexually violent person**. Any consequences of your verdict are matters for the court alone to decide and must not affect your deliberations.

[Give instructions on the verdicts submitted.]

515 UNANIMOUS VERDICT AND SELECTION OF PRESIDING JUROR

Before the jury may return a verdict which may legally be received, the verdict must be reached unanimously; all 12 jurors must agree in order to arrive at a verdict.

When you retire to the jury room, select one of your members to preside over your deliberations. That person's vote is entitled to no greater weight than the vote of any other juror.

If you need to communicate with the court while you are deliberating, send a note through a bailiff, signed by the presiding juror. To have a complete record of this trial, it is important that you communicate with the court only by a written note. If you have questions, the court will talk with the attorneys before answering so it may take some time. Your should continue your deliberations while you wait for an answer. The court will answer any questions in writing or orally here in open court.

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When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside.

After you have reached a verdict:

- The presiding juror will notify the bailiff that a verdict has been reached.
- Everyone will return to the courtroom.
- The verdict will be read into the record in open court.
- The court may ask each of you if you agree with the verdict.

Swear the officer.

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2501 PRELIMINARY INSTRUCTION: COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

A petition has been filed alleging that (name) is a sexually violent person. A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.

Wisconsin law requires that a jury determine whether or not a person is a sexually violent person. That is the purpose of this hearing.

You will now hear testimony. At the conclusion of the hearing, you will be asked to decide whether or not (name) is a sexually violent person.

COMMENT

Wis JI-Criminal 2501 was approved by the Committee in October 1994 and was revised in 1999 and 2005. The 2005 revision reflected changes made in Chapter 980 by 2003 Wisconsin Act 187. This revision was approved by the Committee in February 2011; it involved nonsubstantive changes in the text.

2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

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2502 COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

BEGIN WITH THE OPENING INSTRUCTIONS THAT WOULD BE USED IN A CRIMINAL CASE. MOST CAN BE USED WITHOUT CHANGE. INCLUDED IMMEDIATELY BELOW IS WIS JI-CRIMINAL 145 AND INCLUDED AT THE END IS WIS JI-CRIMINAL 140, BOTH OF WHICH ARE MODIFIED FOR USE HERE.

A petition has been filed alleging that (name) is a sexually violent person. A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not[1] that the person will engage in future acts of sexual violence.

You will now be asked to decide whether or not (name) is a sexually violent person.

The Petition

A petition is nothing more than a written, formal allegation that a person is a sexually violent person. You are not to consider it as evidence against (name) in any way.

State's Burden of Proof

Before you may find that (name) is a sexually violent person, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements are established.[2]

The Elements That Must be Proved

1. That (name) has been convicted of[3] a sexually violent offense.

ELECT ONE OF THE FOLLOWING DEPENDING ON WHAT IS ALLEGED IN THE PETITION.

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[(Name crime specified in § 980.01(6)(a)) is a sexually violent offense.][4]

[(Name crime specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[5] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.[6]]

2. That (name) currently has a mental disorder.

"Mental disorder" as used here, means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence[7] and causes serious difficulty in controlling behavior.[8]

The term "mental disorder" is also used in a more general way by the mental health profession to diagnose and describe mental health-related symptoms and disabilities. Only those mental disorders that predispose a person to engage in acts of sexual violence and cause serious difficulty in controlling behavior are sufficient for purposes of commitment as a sexually violent person.[9]

You are not bound by medical opinions given by witnesses, or by labels or definitions used by witnesses, relating to what is or is not a mental disorder.[10]

3. That (name) is dangerous[11] to others because (he) (she) has a mental disorder which makes it more likely than not[12] that (he) (she) will engage in one or more[13] future acts of sexual violence.

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Meaning of "Acts of Sexual Violence"

"Acts of sexual violence" means acts which would constitute "sexually violent offenses."[14]

ELECT ONE OF THE FOLLOWING DEPENDING ON WHAT IS ALLEGED IN THE PETITION.[15]

[(Name crime or crimes specified in § 980.01(6)(a)) is a sexually violent offense.][16]

[(Name crime or crimes specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[17] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.[18]]

ADD THE FOLLOWING IF EVIDENCE OF OTHER SEXUALLY VIOLENT OFFENSES HAS BEEN ADMITTED.

Evidence of Other Offenses

[Evidence has been submitted that (name) committed other sexually violent offenses before committing (identify offense on which the petition is based). This evidence alone is not sufficient to establish that (name) has a mental disorder. Before you may find that (name) has a mental disorder, you must be so satisfied beyond a reasonable doubt from all the evidence in the case.[19]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the state has proved all three elements, you should find that (name) is a sexually violent person.

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If you are not so satisfied, you must not find that (name) is a sexually violent person.

State's Burden of Proof

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

The law presumes that (name) is not a sexually violent person. Furthermore, (name) does not have to prove anything. The burden is on the State to convince you beyond a reasonable doubt that (name) is a sexually violent person.

If you can reconcile the evidence upon any reasonable hypothesis consistent with (name) not being a sexually violent person, you should do so and find that (name) is not a sexually violent person.

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork, speculation, sympathy, or fear. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give (name) the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.[20]

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COMMENT

Wis JI-Criminal 2502 was originally published in 1995 and was revised in 1996, 1997, 1999, 2001, 2002, 2003, 2004, 2006, 2007, 2011, 2012, and 2016. The 2011 revision changed the definition of "mental disorder" — see footnote 9. This revision was approved by the Committee in December 2016; it added to footnote 12 and added new footnote 20.

The 2007 revision of this instruction reflected changes made in Chapter 980 by 2005 Wisconsin Act 434, effective date: August 1, 2006. A significant change is the reduction from four elements to three. Former element 2 was deleted; it required that the jury find that the petition was filed within 90 days of the person's release from custody. The source of this requirement was State v. Thiel, 2000 WI 67, 235 Wis.2d 823, 612 N.W.2d 94, where the court held that this was a fact for the jury. See footnote 2, below. Thiel was based on the plain meaning of the statutes:

- § 980.05(3)(a) then required that the state prove "the allegations in the petition beyond a reasonable doubt"; and,
- § 980.02(2)(ag) identified the 90-day requirement as something that must be alleged in the petition.

Act 434 amended § 980.05(3)(a) as follows:

(3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving ~~the allegations in the petition~~ beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

Act 434 also repealed § 980.02(2)(ag).

Since Thiel was based on the plain meaning of the statutes, and since the statutes have been changed, the second element of Wis JI-Criminal 2502 has been deleted and the number of elements reduced from four to three.

Other significant changes made by 2005 Wisconsin Act 434 were:

- changes in the lists of "sexually violent offenses" in § 980.01(6)(a) and (b);
- creation of § 980.05(2m)(c), which allows trial by a jury less than 12 if the parties agree and the court approves;
- repeal of § 980.05(1m), which provided that "all constitutional rights available to a defendant in a criminal proceeding are available" to a person facing a Chapter 980 commitment; and,
- creation of §§ 980.031 - 980.038, which specify the procedures for the commitment hearing.

Before 2005 Wisconsin Act 434, significant changes in Chapter 980 had been made by 2003 Wisconsin Act 187. It amended § 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout. The effective date of Act 187 is April 22, 2004. Section 8 of the Act, Initial applicability, reads as follows:

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The treatment of section 980.01(1m) and (7) of the statutes, the renumbering and amendment of section 980.08(4) of the statutes, and the creation of section 980.08(4)(b)2. of the statutes first apply to hearings, trials, and proceedings that are commenced on the effective date of this subsection.

The changes made by Act 187 apply to all proceedings conducted on or after its effective date, including hearings held for individuals originally committed under Chapter 980 before the effective date. State v. Tabor, 2005 WI 107, 282 Wis.2d 768, 699 N.W.2d 663.

This instruction is for the original commitment as a "sexually violent person" under chapter 980. Subsection 980.05(2) provides that "[t]he person who is the subject of the petition, the person's attorney, or the petitioner may request that a trial under this section be to a jury of 12." Subsection 980.03(3) provides that "[n]otwithstanding s. 980.05(2), if the person, the person's attorney, or the petitioner does not request a jury trial, the court may on its own motion require that the trial be to a jury." A verdict must be unanimous. § 980.03(3).

The 1995 version of this instruction was approved as a correct statement of the law in State v. Matek, 223 Wis.2d 611, 589 N.W.2d 441 (Ct. App. 1998). The court rejected the defendant's argument that the following statement should have been added to the instruction:

"Commitment must be based on a current diagnosis of a present disorder that specifically causes the person to be prone to sexually violent acts in the future."

The Committee believes the substance of the statement is included in the current version of the instruction, which was amended in 1999 to add the word "currently" to the statement of element 2. and to add the word "future" to the statement of element 3.

A Chapter 980 petition may be pursued against a person whose crime did not qualify as a Chapter 980 predicate offense at the time of conviction but did qualify at the time he neared the end of his sentence. State ex rel. Washington v. State, 2012 WI App 74, 343 Wis.2d 434, 819 N.W.2d 305.

In State v. Spaeth, 2014 WI 71, 355 Wis.2d 761, 850 N.W.2d 93, a petition for a Chapter 980 commitment was filed based on a conviction that was reversed while the petition was pending. The Wisconsin Supreme Court reversed the trial court's dismissal of the petition, holding that "the sufficiency of a Chapter 980 petition should be assessed as of the time of filing." 355 Wis.2d 761, ¶3. The court noted: "The fact that Spaeth's conviction was later overturned unquestionably impacts the strength of the State's case for his commitment, but this does not negate the validity of the State's petition at the time of the filing." 355 Wis.2d 761, ¶34.

Section 980.063(1) requires that if a person is found to be sexually violent person, the court shall require the person to provide a biological specimen for DNA analysis. 2013 Wisconsin Act 20 amended the statute to further require that "[t]he court shall inform the person that he or she may request expungement under s. 165.77(4)." The expungement referred to relates to inclusion in the DNA data bank.

See Wis JI-Criminal 2503 for a recommended verdict form. State v. Madison, 2004 WI App 46, 271 Wis.2d 218, 678 N.W.2d 607, rejected the argument that a special verdict was required in Chap. 980 cases either by § 805.12(1) or principles of equal protection. The court noted: ". . . our holding should not be read

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to conclude a respondent in a Wis. Stat. ch. 980 commitment proceeding should never have a special verdict." 271 Wis.2d 218, ¶10.

See Wis JI-Criminal 2505 and 2506 for instructions for the decision on discharge from a commitment under chapter 980.

The constitutionality of Wisconsin's Chapter 980 has been consistently upheld. To summarize, the challenges involve two types of claims. First, claims that the statutes violate protections against ex post facto laws and double jeopardy have been rejected on the basis that the statutes have a civil (treatment) purpose, not a criminal (punitive) one. State v. Carpenter, 197 Wis.2d 252, 541 N.W.2d 105 (1995). The United States Supreme Court reached the same conclusion with respect to the Kansas law, which closely resembles Chapter 980. Kansas v. Hendricks, 521 U.S. 346 (1997). Second, claims based on due process and equal protection have been rejected on the basis that the statutes provide a sufficient definition of the "mental disorder" that is the predicate for a commitment. State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995); State v. Laxton, 2002 WI 82, 646 Wis.2d 185, 646 N.W.2d 784. Also see, Kansas v. Hendricks, supra, and Kansas v. Crane, 534 U.S. 407 (2002).

In State v. Rachels, 2002 WI 81, 646 Wis.2d 334, 646 N.W.2d 784, the court reaffirmed the constitutionality of Chapter 980 despite statutory changes made by 1999 Wisconsin Act 9. Those changes provided for automatic commitment to an institution and put limits on re-examinations.

In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court rejected a due process challenge, summarizing its conclusion as follows:

> ¶40 . . . due process does not require proof of a recent overt act in evaluating the dangerousness of the offender when there has been a break in the offender's incarceration and the offender is reincarcerated for nonsexual behavior. Substantive due process allows for a chapter 980 commitment when there is sufficient evidence of current dangerousness. We decline to adopt any bright-line rule that requires current dangerousness to be proven by a particular type of evidence.

Equal protection principles do not require proof of a recent overt act for Chapter 980 commitments. See State v. Post, supra, and State v. Feldmann, 2007 WI App 35, 300 Wis.2d 474, 730 N.W.2d 440.

In State v. Franklin, 2004 WI 38, 270 Wis.2d 271, 677 N.W.2d 276, the court held that "during a commitment proceeding under ch. 980, § 904.04(2) does not apply to evidence offered to prove that the respondent has a mental disorder that makes it substantially probable that the respondent will commit acts of sexual violence in the future." ¶1. The "other acts" evidence must, however, be relevant and not unfairly prejudicial. Franklin, supra, ¶16.

In State v. Sugden, 2010 WI App 166, ¶3, 330 Wis.2d 628, 795 N.W.2d 456, the court held that "the rule of completeness" did not require that an excluded part of the expert's report be put before the jury—that part stated that, if Sugden were released, his risk of reoffending was diminished by the fact that he would be supervised on parole for 22 years—until he was 74 years old.

Regarding appointments of experts under § 980.08(3) [for the court] and § 980.08(4) [for the person facing commitment], see State v. Thiel, 2004 WI App 225, 277 Wis.2d 698, 691 N.W.2d 388.

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In State v. Parrish, 2002 WI App 263, 258 Wis.2d 521, 654 N.W.2d 273, the court held that "claim preclusion" does not bar a Chapter 980 petition following revocation of parole where a pre-parole revocation petition under Chapter 980 had been unsuccessful.

Several state appellate court decisions have addressed procedural matters relating to chapter 980 proceedings. In State v. Byers, 2003 WI 186, 263 Wis.2d 113, 665 N.W.2d 729, the court held that a district attorney may file Chapter 980 petition only if the Department of Corrections requests it and the Department of Justice decides not to file. A chapter 980 petition is timely if filed within 90 days of release from confinement based in any part on a sexually violent offense. State v. Keith, 216 Wis.2d 61, 573 N.W.2d 888 (Ct. App. 1997). Chapter 980 applies to crimes committed on the Lac Du Flambeau reservation. State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. The general guarantee of criminal-related constitutional rights in 980.05(1m) does not overrule the alternate provisions for venue in 980.02(4) and (5). State v. Tainter, 2002 WI App 296, 259 Wis.2d 387, 655 N.W.2d 538. If there is a finding that a person is an appropriate candidate for supervised release, it is an erroneous exercise of discretion to commit that person to a secure facility rather than developing a workable plan for supervised release. State v. Keding, 214 Wis.2d 362, 571 N.W.2d 450 (Ct. App. 1997). Because a sexual predator commitment is civil, the time limits for civil appeal, not a criminal appeal, apply. State v. Brunette, 212 Wis.2d 139, 567 N.W.2d 647 (Ct. App. 1997). In State v. Zanelli, 212 Wis.2d 358, 569 N.W.2d 301 (Ct. App. 1997), the court addressed a variety of issues relating to sexual predator commitment proceedings: timely filing of petition; filing did not breach the earlier plea agreement that did not mention chapter 980; "sworn" petition is not required; reference at the hearing to silence when interviewed was improper; chapter 980 hearings are within the exception to patient-psychologist privilege; the use of a previously-prepared presentence report is within the court's discretion; and the evidence is found to be sufficient to support the commitment. In State v. Treadway, 2002 WI App 195, 257 Wis.2d 467, 651 N.W.2d 334, the court addressed: the time for filing the petition; the number of peremptory challenges allowed; admissibility of a probation officer's opinion regarding the likelihood the individual would reoffend; and, the sufficiency of the evidence to establish that the individual was "a sexually violent person."

The rights and procedures in § 51.61 regarding court authorization of involuntary medication for committed persons not competent to refuse medication apply to persons committed under chapter 980. State v. Anthony D.B., 2000 WI 94, 237 Wis.2d 1, 614 N.W.2d 435.

1. 2003 Wisconsin Act 187 amended § 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout.

2. 2005 Wisconsin Act 434 amended § 980.05(3)(a) to provide that "the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person." Before the amendment, that statute required that the petitioner prove "the allegations in the petition" and § 980.02(2)(ag) required that the petition allege that it was filed within 90 days of the person's release from custody. State v. Thiel, 2000 WI 67, 235 Wis.2d 823, 612 N.W.2d 94, held that this was a fact for the jury. Thiel was based on the plain meaning of the statutes but those statutes were changed by Act 434. Since the statutes have been changed, the former second element of Wis JI-Criminal 2502 has been deleted and the number of elements reduced from four to three.

3. The instruction is drafted for a case alleging that the person has been "convicted of" a sexually violent offense. But persons may also be committed under chapter 980 if they have been "found delinquent

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for a sexually violent offense" or "found not guilty of a sexually violent offense by reason of mental disease or defect." § 980.02(2)(a)2. and 3. If either of these other options is present, the appropriate term must be substituted for "convicted of" throughout the instruction.

4. Subsection 980.01(6)(a), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses":

- § 940.225(1) First Degree Sexual Assault
- § 940.225(2) Second Degree Sexual Assault
- § 948.225(3) Third Degree Sexual Assault
- § 948.02(1) First Degree Sexual Assault Of A Child
- § 948.02(2) Second Degree Sexual Assault Of A Child
- § 948.025 Repeated Acts Of Sexual Assault Of A Child
- § 948.06 Incest With A Child
- § 948.07 Child Enticement
- § 948.085 Sexual Assault Of A Child Placed In Substitute Care

2005 Wisconsin Act 434 also created subsection (6)(am) to include as a sexually violent offense: "An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (a)." This is consistent with the conclusion reached in State v. Irish, 210 Wis.2d 107, 565 N.W.2d 161 (Ct. App. 1997), where the court held that a conviction for child enticement under former § 944.12 can be the predicate for a sexual predator commitment. A conviction under § 944.11(3), 1973-74 Wis. Stats., can be a "sexually violent offense" because the conduct remains prohibited under § 948.02(1), a statute listed in § 948.01(6). "The legislature clearly intended to include, within the definition of 'sexually violent offense,' the conduct prohibited under a previous version of a statute enumerated in Wis. Stat. § 980.01(6), as long as the conduct prohibited under the predecessor statutes remains prohibited under the current enumerated statute." State v. Pharm, 2000 WI App 167, ¶19, 238 Wis.2d 97, 617 N.W.2d 163.

5. Section 980.01(6)(b), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses" if they were sexually motivated:

- § 940.01 First Degree Intentional Homicide
- § 940.02 First Degree Reckless Homicide
- § 940.03 Felony murder
- § 940.05 Second Degree Intentional Homicide
- § 940.06 Second Degree Reckless Homicide
- § 940.19(2) Battery [Substantial Battery With Intent To Cause Bodily Harm]
- § 940.19(4) Battery [Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.19(5) Battery [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.19(6) Battery [Substantial Risk Of Great Bodily Harm]
- § 940.195(4) Battery To An Unborn Child (Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.195(5) Battery To An Unborn Child [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.30 False Imprisonment
- § 940.305 Taking Hostages

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- § 940.31 Kidnapping
- § 941.32 Administering A Dangerous Or Stupefying Drug
- § 943.10 Burglary
- § 943.32 Robbery
- § 948.03 Physical Abuse Of A Child

2005 Wisconsin Act 434 also created subsection (6)(bm) to read:

(6)(bm) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

Subsection 980.05(3)(b) provides that if the petition alleges one of these crimes, "the state is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated."

6. This is the definition provided in § 980.01(5), as amended by 2005 Wisconsin Act 434. Act 434 amended the statute to include reference to "for the sexual humiliation or degradation of the victim."

7. This is the definition provided in § 980.01(2). The Wisconsin Supreme Court found the definition "satisfies the mental condition component required by substantive due process for involuntary mental commitment." State v. Post, 197 Wis.2d 279, 303, 541 N.W.2d 115 (1995).

The Wisconsin definition of "mental disorder" is almost identical to the definition used in the state of Washington's Community Protection Act of 1990, which allows the commitment of "sexually violent predators." The Washington law uses the term "mental abnormality" where Wisconsin uses "mental disorder," but defines it as follows: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." RCW 71.09.020(2). The Washington Supreme Court upheld the constitutionality of the predator provisions in In re Young, 857 P.2d 989 (Wash. 1993). A federal court in Washington found the definition to be inadequate because it created "an unacceptable tautology." Young v. Weston, 898 F. Supp. 744, 750 (D.C. Wash. 1995).

The Kansas Supreme Court has held that a similar definition of "mental abnormality" found in the Kansas Sexually Violent Predator Act failed to satisfy constitutional standards. In re Hendricks, 912 P.2d 129 (Kan. 1996). The United States Supreme Court reversed the state court decision. See Kansas v. Hendricks, 521 U.S. 346 (1997).

8. The phrase "and causes serious difficulty in controlling behavior" was added in February 2002 in response to the decision of the United States Supreme Court in Kansas v. Crane, 534 U.S. 407 (2002). Crane vacated a decision of the Kansas Supreme Court that held the Kansas "sexually violent predator" statute was unconstitutional because it did not require a finding that the individual could not control his dangerous behavior. The Kansas court concluded that Kansas v. Hendricks, 521 U.S. 346 (1997), required that finding. Crane held that Hendricks did not set forth a requirement of total or complete lack of control. "It is enough to say that there must be proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413. The provisions of Wisconsin's Chapter 980 are similar to, though not identical with, the Kansas statutes reviewed in Crane. The Committee concluded that adding reference to "serious difficulty in controlling behavior" to the definition of "mental disorder" was an appropriate response to Crane.

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On July 1, 2002, the Wisconsin Supreme Court decided State v. Laxton, 2002 WI 82, 254 Wis.2d 185, 646 N.W.2d 784. The court reaffirmed that Wisconsin's Chapter 980 is constitutional, held that a separate finding on difficulty in controlling behavior is not required, and held that a jury instruction without reference to "difficulty . . ." was not error: "In summary, we have concluded that civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior. The requisite proof of lack of control is established by proving the nexus between the person's mental disorder and dangerousness." 2002 WI 82, ¶30.

The Laxton court acknowledged the February 2002 revision of Wis JI-Criminal 2502 in a footnote:

> 14. We recognize that after Crane, Wisconsin Jury Instruction-Criminal 2502 was revised to add language linking the mental disorder to the person's difficulty in controlling behavior. The revised jury instruction reads, in part:
>
> > "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. . . . Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. Wis JI-Criminal 2502 (Special Release 2/2002) (footnotes omitted).
>
> The revised language was not used in Laxton's trial. Thus, we do not discuss the impact of the revised language, nor do we comment with either approval or disapproval of the revised language.
> 2002 WI 82, ¶24, footnote 14.

The Committee originally interpreted Crane as requiring that the "serious difficulty in controlling behavior" issue be communicated to the jury. Laxton clearly states that it need not be, because it is implicit in the other standards for a Chapter 980 commitment. Despite the decision in Laxton, the Committee decided to keep the Crane addition in Wis JI-Criminal 2502, concluding, in short, that it is prudent to make explicit what is implicit in the statutory standard.

The evidence was found to be sufficient in a post-Laxton case in State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. Also see State v. Tainter, 2002 WI App 296, 259 Wis.2d 389, 655 N.W.2d 538.

9. The 2011 revision changed the definition of "mental disorder" to make it more understandable to the jury and to address an inconsistency in the previously published version. In an unpublished decision, the Wisconsin Court of Appeals noted that the 2007 version of the instruction was "internally inconsistent" in its definition of "mental disorder," but concluded that the instruction as a whole properly conveyed the required elements. State v. Williams, No. 2010AP781, decided Nov. 18, 2010.

The source of the difficulty is that "mental disorder" is used as a term of art in Chapter 980 and has a specific definition — see § 980.01(2) — that is essential to the constitutionality of the sexually violent persons law. See State v. Post, 197 Wis.2d 279, 306, 541 N.W.2d 115 (1995). However, "mental disorder" is also the term used in a broader sense by mental health professionals to describe and categorize mental health-related symptoms. [See Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, American

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Psychiatric Association (1994).] And, the term is one that lay persons, including jurors, may also use in a non-technical sense. The revised instruction acknowledges that the term "mental disorder" may have these other meanings in other contexts but emphasizes that "as used here" for purposes of Chapter 980 commitment, it must be given its specific Chapter 980 meaning.

In State v. Adams, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998), the court found the evidence sufficient to establish "mental disorder" and held that an antisocial personality disorder can qualify as a "mental disorder" if it predisposes the specific defendant to sexual violence. In State v. Zanelli, 223 Wis.2d 545, 589 N.W.2d 687 (Ct. App. 1998), the court found that the evidence was sufficient to show "mental disorder" based on pedophilia and held that proof is not limited to literal compliance with the DSM-IV criteria for pedophilia — the ultimate issue is whether a "mental disorder" is established.

"[T]he jury must unanimously agree that [the person] suffers from a 'mental disorder' that predisposes him to commit acts of sexual violence . . . [U]nanimity requirements are satisfied, even if jurors disagree as to which mental disease predisposes the defendant to recidivism." State v. Pletz, 2000 WI App 221, ¶19, 239 Wis.2d 49, 619 N.W.2d 97.

10. This statement is based on the one included in Wis JI-Criminal 605, Instruction on the Issue of the Defendant's Criminal Responsibility (Mental Disease). A slightly different version of this statement was cited in Post as an "apt analogy illustrating the need for separation between legal and medical definitions" when "descriptions designed for clinical use are transplanted into the forensic setting." State v. Post, supra, 197 Wis.2d 279, 305.

11. In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court made several general comments about proof of the "dangerousness" requirement: due process does not require proof of a recent overt act while on parole [¶29]; ". . . chapter 980 is reserved for only the most dangerous offenders" [¶32]; "predicting an offender's dangerousness under chapter 980 is a complex evaluation" [¶33]; an offender's behavior while incarcerated can be relevant to a determination of current dangerousness [¶37]; and, ". . . the sexually violent offense for which Bush is incarcerated may be relevant evidence of current dangerousness." [¶38].

In State v. Sorenson, 2002 WI 78, 254 Wis.2d 54, 646 N.W.2d 354, the defendant contended it was error for the trial court to preclude him from introducing evidence relating to a prior conviction for a sexual offense in his Chapter 980 commitment trial. He sought to present evidence that the victim had recanted as part of a challenge to the claim that he suffered from a mental disorder and was dangerous. The Wisconsin Supreme Court remanded the case for a determination whether the recantation evidence "meets the test for newly discovered evidence sufficient to warrant a new trial." 2002 WI 78, ¶2. If it does, "any application of issue preclusion to exclude this evidence from Sorenson's ch. 980 trial would be fundamentally unfair. . ." 2002 WI 78, ¶25. [Note: Sorenson did not challenge the validity of the prior conviction. He sought to challenge its probative value as to the "mental disorder" and "dangerous to others" requirements.]

In State v. Olson, 2006 WI App 32, 290 Wis.2d 202, 712 N.W.2d 61, the court of appeals rejected a claim that the Chapter 980 definition "is unconstitutional because its definition of 'dangerousness' lacks a 'temporal context' limited to 'imminent danger.' . . . It is the propensity for sexual violence, not the precise point at which it may manifest itself, that makes the individual particularly threatening to society." ¶1.

Evidence of possible conditions of supervision is properly excluded from a commitment proceeding because it is not relevant to determining whether the person is a sexually violent person. State v. Mark, 2006 WI 78, ¶41, 292 Wis.2d 1, 718 N.W.2d 90.

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12. 2003 Wisconsin Act 187 amended 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout. See the Comment preceding note 1, supra, discussing the effective date of the change. In State v. Nelson, 2007 WI App 2, 298 Wis.2d 453, 727 N.W.2d 364, the court of appeals held that the change from "substantially probable" to "likely" did not violate the person's rights to due process or equal protection.

A preceding version of this instruction defined "substantial probability" as "much more likely than not." See State v. Curiel, 227 Wis.2d 389, 597 N.W.2d 697 (1999). For cases finding the evidence sufficient to satisfy the "substantial probability" standard, see State v. Marberry, 231 Wis.2d 581, 605 N.W.2d 612 (Ct. App. 1999) and State v. Brown, 2002 WI App 260, 258 Wis.2d 237, 655 N.W.2d 157.

In State v. Smalley, 2007 WI App 219, 305 Wis.2d 709, 741 N.W.2d 286, the court of appeals concluded that it was error for an expert to testify that his understanding of "more likely than not" meant "more than zero." However, the court determined that this "isolated misstep did not prevent the real controversy from being tried." ¶2. The court elaborated on the meaning of "more likely than not":

> ¶12 "More likely than not" is not an obscure or specialized term of art, but a commonly-used expression. It is hard to think of a clearer definition of the term than the term itself; though perhaps its expansion to "more likely to happen than not to happen" is more explicit. We find it difficult to imagine that any juror was without an understanding of the phrase's meaning before, during or after the trial, or that any juror thought the phrase meant something other than "more likely to happen than not to happen."

13. The 2007 revision added the reference to "one or more" acts. 2005 Wisconsin Act 434 amended the definition of "sexually dangerous person" in sub. (7) of § 980.01 as follows: ". . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." While the instruction does not directly use this definition, element 3. expresses the same concept, using the statement in § 980.02(2)(c): "The person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence." Act 434 did not amend sub. (2)(c) to add the reference to "one or more." However, Act 434 amended § 980.05(3)(a) to read:

> (3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

The Committee concluded that this was a sufficient basis for adding the reference to "one or more" to the definition in the instruction.

14. This was originally the Committee's conclusion; it was not directly stated in the statutes. However, 2005 Wisconsin Act 434 created § 980.01(1b) to read as follows: "'Act of sexual violence' means conduct that constitutes the commission of a sexually violent offense." This is virtually the same definition adopted in the instruction.

This interpretation results in having "sexually violent offense" as a part of each of three parts of the jury's determination. First, the person must have had a prior conviction for a "sexually violent offense." Second, the person's mental disorder must predispose the person to engage in acts of sexual violence, defined

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as "sexually violent offenses." Third, the person must be dangerous because he has mental disorder which makes it more likely than not that he will engage in acts of sexual violence, again defined as "sexually violent offenses."

15. The Committee assumes that most cases will involve reference to the same "acts of sexual violence" for the purposes of both the second and third factual determinations. See note 16. If they differ, or if it is believed necessary to describe the offenses specifically, the instruction should be tailored to refer to the different offenses that apply in each situation.

16. See note 4, supra, for the offenses specified in § 980.01(6)(a). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

17. See note 5, supra, for the offenses specified in § 980.01(6)(b). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

18. This is the definition provided in § 980.01(5), as amended by 2005 Wisconsin Act 434. Act 434 amended the statute to include reference to "for the sexual humiliation or degradation of the victim."

19. The first sentence of the material in brackets is based on § 980.05(4) which provides that "[e]vidence that the person . . . was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder."

20. The explanation of the state's burden of proof is based on the standard instruction for criminal cases, Wis JI-Criminal 140 Burden Of Proof And Presumption Of Innocence. The concluding sentence of that instruction, which also appears here, was reviewed by the Committee in 2016. The Committee's conclusions, which also apply here, are described as follows in footnote 5, Wis JI-Criminal 140:

> In 2016, the Committee received several inquiries about the phrase "you are to search for the truth," some based on a recent law review article. Cecchini and White, "Truth Or Doubt? An Empirical Test Of Criminal Jury Instructions," 50 U. Richmond Law Review 1139 (2016). After careful consideration, the Committee decided not to change the text of the instruction. Challenges to including "search for the truth" in the reasonable doubt instruction have been rejected by Wisconsin appellate courts. State v. Avila, 192 Wis.2d 870, 890, 532 N.W.2d 423 (1995) (overruled on other grounds in State v. Gordon, 2003 WI 69, ¶40, 262 Wis.2d 380, 663 N.W.2d 765): "In the context of the entire instruction, we conclude that [JI 140] did not dilute the State's burden of proving guilt beyond a reasonable doubt." Also see, Manna v. State, 179 Wis. 384, 399-340, 192 N.W. 160 (1923).
>
> If an addition to the text is desired, the Committee recommends the following, which is modeled on the 1962 version of Wis JI-Criminal 140:
>
> You are to search for the truth and give the defendant the benefit of any reasonable doubt that remains after carefully considering all the evidence in the case.

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2503 VERDICT: COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

The following two forms of verdict will be submitted to you for your consideration.

One reading: "We, the jury, find that (name) is a sexually violent person as alleged in the petition."

And the other reading: "We, the jury, do not find that (name) is a sexually violent person."

It is for you to determine which one of the forms of verdict submitted you will bring in as your verdict.

COMMENT

Wis JI-Criminal 2503 was approved by the Committee October 1994. It was republished without change in 1997, 2000, and 2011.

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2505 PRELIMINARY INSTRUCTION: HEARING ON DISCHARGE OF A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

Wisconsin law provides that a person may be committed to the custody of the Department of Health and Family Services if the person is found to be a sexually violent person. (Name of petitioner) was committed under this law.

A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.

Wisconsin law provides that a person committed may petition for discharge. (Name of petitioner) has filed a petition for discharge and Wisconsin law also provides that a jury determine whether the petition for discharge should be granted. The burden of proof is on the State to satisfy you to a reasonable certainty by evidence that is clear and convincing that (name of petitioner) is still a sexually violent person.

At the conclusion of the hearing you will be asked to decide whether (name of petitioner) is still a sexually violent person.

COMMENT

Wis JI-Criminal 2505 was originally published in 1996 and revised in 1999, 2005 and 2012. This revision was approved by the Committee in February 2014; it updated the Comment.

This instruction is intended to be used as a preliminary instruction at the beginning of a hearing on a petition for discharge of a person committed as a "sexually violent person" under Chapter 980. See §§ 980.09 and 980.095. Section 980.09, as originally enacted, provided that the discharge hearing "shall be to the court." The Wisconsin Supreme Court held in State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995), that equal protection requires that the person be afforded the right to a jury at the discharge hearing. The Post decision compared Chapter 980 proceedings with those applicable to civil mental commitments under Chapter 51, and held that a 6-person jury and the "clear and convincing" burden of proof applied. Based on the

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comparison with Chapter 51, the Committee concluded that a five-sixths verdict should apply. See § 51.20(11)(b), providing for a five-sixths verdict for civil commitment reexaminations.

2005 Wisconsin Act 434 [effective date: August 1, 2006] repealed and recreated § 980.09 and created § 980.095. Both sections were also amended by 2013 Wisconsin Act 84 [effective date: December 14, 2013]. Section 980.09(3) provides for a trial before the court or a jury at which "the state has the burden to prove by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Section 980.095 provides as follows with regard to the trial:

- the district attorney or the department of justice, whichever filed the original petition, or the person who filed the petition for discharge may request that the trial be held before a jury of 6. [§ 980.095(1)(a)].

- a jury is deemed waived unless it is demanded within 10 days of the determination by the court that a court or jury would likely conclude under s. 980.09(1) that the person's condition has sufficiently changed. [§ 980.095(1)(a)].

- jury selection procedures are set forth in § 980.095(1)(b).

- the verdict must be agreed to by at least 5 jurors. [§ 980.095(1)(c)]

2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

Wis JI-Criminal 2506 is the instruction to be given at the end of the hearing.

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2506 DISCHARGE OF A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

You will now be asked to decide whether (name) is still a sexually violent person.[1]

State's Burden of Proof

Before you may find that (name) is still a sexually violent person, the state must prove by evidence which satisfies you to a reasonable certainty by evidence that is clear and convincing that the following three facts are established.[2]

The Facts That Must Be Established

1. That (name) has been convicted of[3] a sexually violent offense.

   ELECT ONE OF THE FOLLOWING DEPENDING ON THE BASIS FOR THE COMMITMENT.

   [(Name crime specified in § 980.01(6)(a)) is a sexually violent offense.][4]

   [(Name crime specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[5] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification.][6]

2. That (name) currently has a mental disorder.

   "Mental disorder" as used here, means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence[7] and causes serious difficulty in controlling behavior.[8]

   The term "mental disorder" is also used in a more general way by the mental health profession to diagnose and describe mental health-related symptoms and

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disabilities. Only those mental disorders that predispose a person to engage in acts of sexual violence and cause serious difficulty in controlling behavior are sufficient for purposes of commitment as a sexually violent person.[9]

You are not bound by medical opinions given by witnesses, or by labels or definitions used by witnesses, relating to what is or is not a mental disorder.[10]

3. That (name) is dangerous to others because he has a mental disorder which makes it more likely than not[11] that he will engage in one or more future acts of sexual violence.

Meaning of "Acts of Sexual Violence"

"Acts of sexual violence" means acts which would constitute "sexually violent offenses."[12]

ELECT ONE OF THE FOLLOWING DEPENDING ON THE BASIS FOR THE COMMITMENT.[13]

[(Name crime or crimes specified in § 980.01(6)(a)) is a sexually violent offense.][14]

[(Name crime or crimes specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[15] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification.][16]

ADD THE FOLLOWING IF EVIDENCE OF OTHER SEXUALLY VIOLENT OFFENSES HAS BEEN ADMITTED.

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Evidence of Other Offenses

[Evidence has been submitted that (name) committed other sexually violent offenses before committing (identify offense on which the commitment is based). This evidence alone is not sufficient to establish that (name) has a mental disorder.[17] Before you may find that (name) has a mental disorder, you must be so satisfied to a reasonable certainty by evidence that is clear and convincing.]

Jury's Decision

The following verdict will be submitted to you for your consideration:

"Is (name) still a sexually violent person?"

Before you may answer this question "yes," the State must satisfy you to a reasonable certainty by evidence that is clear and convincing that (name) has been convicted of a sexually violent offense, that he has a mental disorder, and that he is dangerous to others because the mental disorder makes it more likely than not that he will engage in one or more future acts of sexual violence.

If you are not so satisfied, you must answer the question "no."

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

The burden is on the State to satisfy you to a reasonable certainty by evidence that is clear and convincing that (name) is still a sexually violent person.

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"Clear and convincing evidence" means evidence which, when weighed against that opposed to it, clearly has more convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.[18]

The law provides that any verdict returned by the jury shall be agreed to by at least five of the jurors. I ask you to try to be unanimous if you can.[19]

Closing

When you retire to the jury room select one of your members to preside over your deliberations. His or her vote is entitled to no greater weight than the vote of any other juror.

When you have agreed upon your verdict, have it signed and dated by the person you have selected to preside. At the foot of the verdict, you will find a place provided where a dissenting juror, if there is one, will sign his or her name. Either the blank line or the space below it may be used for that purpose.

Swear the officer.

COMMENT

Wis JI-Criminal 2506 was originally published in 1996 and was revised in 1997, 1999, 2005, 2012, 2015, and 2017. The 2012 revision changed the definition of "mental disorder" — see footnote 9 — and revised and updated the Comment. The 2015 revision added a definition of the burden of persuasion and updated the Comment. This revision was approved by the Committee in December 2016; it added to the Comment.

This instruction is for the finding at a hearing on a petition for discharge of a person committed as a "sexually violent person" under Chapter 980. See §§ 980.09 and 980.095. Section 980.09, as originally enacted, provided that the discharge hearing "shall be to the court." The Wisconsin Supreme Court held in

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State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995), that equal protection requires that the person be afforded the right to a jury at the discharge hearing. The Post decision compared Chapter 980 proceedings with those applicable to civil mental commitments under Chapter 51, and held that a 6-person jury and the "clear and consuming" burden of proof applied. Based on the comparison with Chapter 51, the Committee concluded that a five-sixths verdict should apply. See § 51.20(11)(b), providing for a five-sixths verdict for civil commitment reexaminations.

2005 Wisconsin Act 434 [effective date: August 1, 2006] repealed and recreated § 980.09 and created § 980.095. Both sections were also amended by 2013 Wisconsin Act 84 [effective date: December 14, 2013]. Section 980.09(3) provides for a trial before the court or a jury at which "the state has the burden to prove by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Section 980.095 provides as follows with regard to the trial:

- the district attorney or the department of justice, whichever filed the original petition, or the person who filed the petition for discharge may request that the trial be held before a jury of 6. [§ 980.095(1)(a)].

- a jury is deemed waived unless it is demanded within 10 days of the determination by the court that a court or jury would likely conclude under s. 980.09(1) that the person's condition has sufficiently changed. [§ 980.095(1)(a)].

- jury selection procedures are set forth in § 980.095(1)(b).

- the verdict must be agreed to by at least 5 jurors. [§ 980.095(1)(c)]

2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

Wis JI-Criminal 2505 provides a preliminary instruction to be given at the beginning of the hearing.

There is no case law or statutory requirement that the jury at a Chapter 980 discharge hearing be advised of the consequence of a decision to discharge; whether to grant a person's request for an instruction telling the jury that he would be under supervision is within the trial court's discretion. State v. Lombard, 2004 WI App 52, 271 Wis.2d 529, 678 N.W.2d 338.

In State v. Richard, 2011 WI App 66, 333 Wis.2d 708, 799 N.W.2d 509, the court specified the procedure to be followed when a petition for discharge is filed:

> ¶11. . . . The circuit court must then engage in a two-step review process to determine if the offender is entitled to a discharge hearing. First, the court must conduct a "paper review" of the offender's petition and its attachments to see if there are any alleged facts "from which the court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually

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violent person." State v. Arends, 2010 WI 46, ¶¶25-26, 325 Wis.2d 1, 784 N.W.2d 513 (quoting § 980.09(1)). The purpose of the paper review "is to weed out meritless and unsupported petitions." Arends, 325 Wis.2d 1, ¶28. If there are no facts alleged from which a trier of fact could conclude that the offender is no longer a sexually violent person, the circuit court must deny the petition. Id., ¶30.

¶12 If the offender passes the initial screen, the circuit court shall proceed to the second step of the review process. Id.; Wis. Stat. § 980.09(2). Under the second step of this process, the court must consider: (1) any current and past reexamination reports or treatment progress reports filed under Wis. Stat. § 980.07; (2) relevant facts in the petition and in the State's written response; (3) arguments of counsel; and (4) any supporting documentation provided by the person or the State. Arends, 325 Wis.2d 1, ¶32. If, after this second step in the review process, the circuit court determines that a fact finder could conclude that an offender no longer meets the criteria for commitment as a sexually violent person, the offender is entitled to a discharge hearing. Id., ¶43. If not, the offender's discharge petition must be denied.

The requirement in § 980.09(1) that a petition for a discharge from a Chapter 980 commitment allege facts from which the court or jury may conclude the person's condition has changed "includes not only a change in the person himself or herself, but also a change in the professional knowledge and research used to evaluate a person's mental disorder or dangerousness, if the change is such that a fact-finder could conclude the person does not meet the criteria for a sexually violent person." State v. Ermers, 2011 WI App 113, ¶1, 336 Wis.2d 451, 802 N.W.2d 540.

Section 980.09(1) was amended by 2013 Wisconsin Act 84 [effective date: December 14, 2013] to slightly change the wording that was quoted in the Richard and Ermers cases. The amended statute provides that:

> . . . The court shall deny the petition . . . without a hearing unless the petition alleges facts from which the court or jury would likely conclude the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment if the person has never received a hearing on the merits of a discharge petition, so that the person no longer meets the criteria for commitment as a sexually violent person.

In State v. Richard, 2014 WI App 28, 353 Wis.2d 219, 844 N.W.2d 370, the issue was whether a person committed under Chapter 980 was entitled to a discharge hearing when the petition was "based on amendments to an actuarial instrument used at trial that, in an evaluating expert's opinion, reduced the petitioner's risk to reoffend below the legal threshold of 'more likely than not.'" The court of appeals concluded "that when a petitioner alleges that he or she is no longer a sexually violent person, and supports his or her petition with a recent psychological evaluation applying new professional research to conclude that the petitioner is no longer likely to commit acts of sexual violence, the petitioner is entitled to a discharge hearing . . ." Richard, ¶1.

Summary judgment is not available to the respondent in a Chapter 980 discharge proceeding. State v. Allison, 2010 WI App 103, 329 Wis.2d 129, 789 N.W.2d 120.

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In State v. Alger, 2015 WI 3, 360 Wis.2d 193, 858 N.W.2d 346, the court addressed the applicability of the Daubert standard for expert testimony to a discsharge proceeding in a Chapter 980 case. The Daubert standard, as adopted in § 907.02(1), applies to "actions" or "special proceedings" commenced on or after February 1, 2011. In Alger (and in Knipfer, a companion case consolidated for appeal) the commitment proceedings took place before that effective date but the discharge proceedings began after the date. The court concluded that ". . . although Alger's and Knipfer's petitions seek relief from those original commitments, those filings do not constitute the 'commencement' of an 'action' or a 'special proceeding.'" ¶4. Therefore, the standard in § 907.02(1) does not apply.

1. Section 980.09(3) provides that at the hearing, the "state has the burden of proving by clear and convincing evidence that the petitioner meets the criteria for commitment as a sexually violent person."

2. In State v. Post, 197 Wis.2d 279, 328-29, 541 N.W.2d 115 (1995), the Wisconsin Supreme Court held that "equal protection demands that a right to a jury trial be made available at this important stage," referring to the discharge hearing. A jury of six is sufficient [§ 980.095(1)] and "the state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." See § 980.09(3). The required aspects of a "sexually violent person" finding are set forth in § 980.02(2):

(a) the person has been convicted of a sexually violent offense [or found delinquent for, or found not guilty by reason of mental disease or defect of such an offense];

(b) has a mental disorder;

(c) is dangerous to others because the person's mental disorder makes it more likely than not that he or she will engage in acts of sexual violence.

These three facts are defined in the instruction in the same manner as in the instruction for the original commitment. See Wis JI-Criminal 2502.

The clear and convincing evidence standard satisfies due process at a discharge proceeding. State v. Talley, 2015 WI App 4, 359 Wis.2d 521, 859 N.W.2d 155.

3. The instruction is drafted for a case alleging that the person has been "convicted of" a sexually violent offense. But persons may also be committed under Chapter 980 if they have been "found delinquent for a sexually violent offense" or "found not guilty of a sexually violent offense by reason of mental disease or defect." § 980.02(2)(a)2. and 3. If either of these other options is present, the appropriate term must be substituted for "convicted of" throughout the instruction.

4. Section 980.01(6)(a) provides that the following crimes are "sexually violent offenses":

- § 940.225(1) First Degree Sexual Assault
- § 940.225(2) Second Degree Sexual Assault
- § 948.225(3) Third Degree Sexual Assault
- § 948.02(1) First Degree Sexual Assault Of A Child
- § 948.02(2) Second Degree Sexual Assault Of A Child

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- § 948.025 Repeated Acts Of Sexual Assault Of A Child
- § 948.06 Incest With A Child
- § 948.07 Child Enticement
- § 948.085 Sexual Assault Of A Child Placed In Substitute Care

In State v. Irish, 210 Wis.2d 107, 565 N.W.2d 161 (Ct. App. 1997), the court held that a conviction for child enticement under former § 944.12 can be the predicate for a sexual predator commitment. See note 4, Wis JI-Criminal 2502.

5. Section 980.01(6)(b), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses" if they were sexually motivated:

- § 940.01 First Degree Intentional Homicide
- § 940.02 First Degree Reckless Homicide
- § 940.03 Felony murder
- § 940.05 Second Degree Intentional Homicide
- § 940.06 Second Degree Reckless Homicide
- § 940.19(2) Battery [Substantial Battery With Intent To Cause Bodily Harm]
- § 940.19(4) Battery [Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.19(5) Battery [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.19(6) Battery [Substantial Risk Of Great Bodily Harm]
- § 940.195(4) Battery To An Unborn Child (Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.195(5) Battery To An Unborn Child [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.30 False Imprisonment
- § 940.305 Taking Hostages
- § 940.31 Kidnapping
- § 941.32 Administering A Dangerous Or Stupefying Drug
- § 943.10 Burglary
- § 943.32 Robbery
- § 948.03 Physical Abuse Of A Child

2005 Wisconsin Act 434 also created subsection (6)(bm) to read:

(6)(bm) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

Subsection 980.05(3)(b) provides that if the petition alleges one of these crimes, "the state is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated."

6. This is the definition provided in § 980.01(5).

7. This is the definition provided in § 980.01(2). The Wisconsin Supreme Court found the definition "satisfies the mental condition component required by substantive due process for involuntary mental commitment." State v. Post, 197 Wis.2d 279, 303, 541 N.W.2d 115 (1995).

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The Wisconsin definition of "mental disorder" is almost identical to the definition used in the state of Washington's Community Protection Act of 1990, which allows the commitment of "sexually violent predators." The Washington law uses the term "mental abnormality" where Wisconsin uses "mental disorder," but defines it as follows: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." RCW 71.09.020(2). The Washington Supreme Court upheld the constitutionality of the predator provisions in In re Young, 857 P.2d 989 (Wash. 1993). A federal court in Washington found the definition to be inadequate because it created "an unacceptable tautology." Young v. Weston, 898 F. Supp. 744, 750 (D.C. Wash. 1995).

The Kansas Supreme Court has held that a similar definition of "mental abnormality" found in the Kansas Sexually Violent Predator Act failed to satisfy constitutional standards. In re Hendricks, 912 P.2d 129 (Kan. 1996). The United States Supreme Court reversed the state court decision. See Kansas v. Hendricks, 521 U.S. 346 (1997).

8. The phrase "and causes serious difficulty in controlling behavior" was added in February 2002 in response to the decision of the United States Supreme Court in Kansas v. Crane, 534 U.S. 407 (2002). Crane vacated a decision of the Kansas Supreme Court that held the Kansas "sexually violent predator" statute was unconstitutional because it did not require a finding that the individual could not control his dangerous behavior. The Kansas court concluded that Kansas v. Hendricks, 521 U.S. 346 (1997), required that finding. Crane held that Hendricks did not set forth a requirement of total or complete lack of control. "It is enough to say that there must be proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413. The provisions of Wisconsin's Chapter 980 are similar to, though not identical with, the Kansas statutes reviewed in Crane. The Committee concluded that adding reference to "serious difficulty in controlling behavior" to the definition of "mental disorder" was an appropriate response to Crane.

On July 1, 2002, the Wisconsin Supreme Court decided State v. Laxton, 2002 WI 82, 254 Wis.2d 185, 646 N.W.2d 784. The court reaffirmed that Wisconsin's Chapter 980 is constitutional, held that a separate finding on difficulty in controlling behavior is not required, and held that a jury instruction without reference to "difficulty . . ." was not error: "In summary, we have concluded that civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior. The requisite proof of lack of control is established by proving the nexus between the person's mental disorder and dangerousness." 2002 WI 82, ¶30.

The Laxton court acknowledged the February 2002 revision of Wis JI-Criminal 2502 in a footnote:

> 14. We recognize that after Crane, Wisconsin Jury Instruction-Criminal 2502 was revised to add language linking the mental disorder to the person's difficulty in controlling behavior. The revised jury instruction reads, in part:
>
> > "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. . . . Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. Wis JI-Criminal 2502 (Special Release 2/2002) (footnotes omitted).

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> The revised language was not used in Laxton's trial. Thus, we do not discuss the impact of the revised language, nor do we comment with either approval or disapproval of the revised language.
> 2002 WI 82, ¶24, footnote 14.

The Committee originally interpreted Crane as requiring that the "serious difficulty in controlling behavior" issue be communicated to the jury. Laxton clearly states that it need not be, because it is implicit in the other standards for a Chapter 980 commitment. Despite the decision in Laxton, the Committee decided to keep the Crane addition in Wis JI-Criminal 2502, concluding, in short, that it is prudent to make explicit what is implicit in the statutory standard.

The evidence was found to be sufficient in a post-Laxton case in State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. Also see State v. Tainter, 2002 WI App 296, 259 Wis.2d 389, 655 N.W.2d 538.

9. The 2011 revision changed the definition of "mental disorder" to make it more understandable to the jury and to address an inconsistency in the previously published version. In an unpublished decision, the Wisconsin Court of Appeals noted that the 2007 version of the instruction was "internally inconsistent" in its definition of "mental disorder," but concluded that the instruction as a whole properly conveyed the required elements. State v. Williams, No. 2010AP781, decided Nov. 18, 2010.

The source of the difficulty is that "mental disorder" is used as a term of art in Chapter 980 and has a specific definition — see § 980.01(2) — that is essential to the constitutionality of the sexually violent persons law. See State v. Post, 197 Wis.2d 279, 306, 541 N.W.2d 115 (1995). However, "mental disorder" is also the term used in a broader sense by mental health professionals to describe and categorize mental health-related symptoms. [See Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, American Psychiatric Association (2013).] And, the term is one that lay persons, including jurors, may also use in a non-technical sense. The revised instruction acknowledges that the term "mental disorder" may have these other meanings in other contexts but emphasizes that "as used here" for purposes of Chapter 980 commitment, it must be given its specific Chapter 980 meaning.

In State v. Adams, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998), the court found the evidence sufficient to establish "mental disorder" and held that an antisocial personality disorder can qualify as a "mental disorder" if it predisposes the specific defendant to sexual violence. In State v. Zanelli, 223 Wis.2d 545, 589 N.W.2d 687 (Ct. App. 1998), the court found that the evidence was sufficient to show "mental disorder" based on pedophilia and held that proof is not limited to literal compliance with the DSM-IV criteria for pedophilia — the ultimate issue is whether a "mental disorder" is established.

"[T]he jury must unanimously agree that [the person] suffers from a 'mental disorder' that predisposes him to commit acts of sexual violence . . . [U]nanimity requirements are satisfied, even if jurors disagree as to which mental disease predisposes the defendant to recidivism." State v. Pletz, 2000 WI App 221, ¶19, 239 Wis.2d 49, 619 N.W.2d 97.

10. This statement is based on the one included in Wis JI-Criminal 605, Instruction on the Issue of the Defendant's Criminal Responsibility (Mental Disease). A slightly different version of this statement was cited in Post as an "apt analogy illustrating the need for separation between legal and medical definitions" when "descriptions designed for clinical use are transplanted into the forensic setting." State v. Post, supra, 197 Wis.2d 279, 305.

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11. 2003 Wisconsin Act 187 amended the definition of "sexually violent person" in § 980.01(7) by replacing "creates a substantial probability" that the person will engage in future acts of sexual violence with "makes it likely" that the person will do so. The Act also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instructions use "makes it more likely than not" throughout.

In State v. Smalley, 2007 WI App 219, 305 Wis.2d 709, 741 N.W.2d 286, the court of appeals concluded that it was error for an expert to testify at a Chapter 980 commitment hearing that his understanding of "more likely than not" meant "more than zero." However, the court determined that this "isolated misstep did not prevent the real controversy from being tried." ¶2. The court elaborated on the meaning of "more likely than not":

> ¶12. "More likely than not" is not an obscure or specialized term of art, but a commonly-used expression. It is hard to think of a clearer definition of the term than the term itself; though perhaps its expansion to "more likely to happen than not to happen" is more explicit. We find it difficult to imagine that any juror was without an understanding of the phrase's meaning before, during or after the trial, or that any juror thought the phrase meant something other than "more likely to happen than not to happen."

12. This is the Committee's conclusion; it is not directly stated in the statutes. However, another provision of Chapter 980, which requires notice to victims, provides as follows: '"Act of sexual violence' means an act or attempted act that is a basis for an allegation made in a petition under s. 980.02(2)(a)." See § 980.11(1)(a). The acts alleged in the petition are those that qualify as "sexually violent offenses."

This interpretation results in having "sexually violent offense" as a part of each of three parts of the jury's determination. First, the person must have had a prior conviction for a "sexually violent offense." Second, the person's mental disorder must predispose the person to engage in acts of sexual violence, defined as "sexually violent offenses." Third, the person must be dangerous because he has mental disorder which creates a substantial probability that he will engage in acts of sexual violence, again defined as "sexually violent offenses."

13. The Committee assumes that most cases will involve reference to the same "acts of sexual violence" for the purposes of both the second and third factual determinations. See note 12, supra. If they differ, or if it is believed necessary to describe the offenses specifically, the instruction should be tailored to refer to the different offenses that apply in each situation.

14. See note 4, supra, for the offenses specified in § 980.01(6)(a). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

15. See note 5, supra, for the offenses specified in § 980.01(6)(b). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

16. This is the definition provided in § 980.01(5).

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17. This sentence is based on § 980.05(4) which provides for the purposes of the original commitment, that "[e]vidence that the person . . . was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder."

18. The paragraphs defining the burden of persuasion were added to the instruction in 2014. They are adapted from Wis JI-Criminal 140A Burden Of Proof: Forfeiture Actions.

19. Section 980.095(3) provides for a five-sixths verdict.

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2590 MAKING A FALSE STATEMENT IN AN APPLICATION FOR A CERTIFICATE OF TITLE — § 342.06

Section 342.06(2) of the Wisconsin Statues is violated by one who knowingly makes a false statement in an application for certificate of title.

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

The first element requires that the defendant made a false statement in an application for a certificate of title.[1]

The second element requires that the defendant made the false statement knowingly. This requires that the defendant knew the statement was false.

If you are satisfied beyond a reasonable doubt that the defendant knowingly made a false statement in an application for a certificate of title, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 2600 in 1993. It was renumbered Wis JI-Criminal 2590 in 2004.

This instruction is for a violation of § 342.06(2), which provides as follows:

> Any person who knowingly makes a false statement in an application for a certificate of title is guilty of a Class H felony.

1. The person who makes the false statement need not be the one who submits the application to the Department of Transportation. The statute applies to a person who makes a false statement in the "Dealer's Statement of Sale" portion of the application form. State v. Williams, 156 Wis.2d 296, 299, 456 N.W.2d 864 (Ct. App. 1990).

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2600 OPERATING WHILE INTOXICATED: INTRODUCTORY COMMENT

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Scope

Material describing issues relating to "drunk driving" offenses was first published as Wis JI-Criminal 2660-2665 Introductory Comment in 1982. It outlined the major changes in Wisconsin law made by Chapters 20 and 184, Laws of 1981. The most significant of those changes was the creation of offenses based on the alcohol concentration of the driver. The material was significantly revised in 1993 to emphasize the changes made by 1991 Wisconsin Act 277. The most significant of those changes, at least in terms of its effect on the jury instructions, was the creation of "0.08" as the level of prohibited alcohol concentration for offenders with two or more prior offenses.

In 2004, this material was republished as Wis JI-Criminal 2600 and substantially expanded to collect all explanatory material relating to "operating while intoxicated offenses" — those in the Motor Vehicle Code and in the Criminal Code. "Operating while intoxicated" is used as the general term to cover operating "while under the influence" and "with a prohibited alcohol concentration." Footnotes to instructions for specific offenses refer to material contained here.

I. Motor Vehicle Code Offenses Apply "On a highway."

Section 346.61 provides that statutes defining reckless driving and operating while intoxicated — §§ 346.62 to 346.64 — apply to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." Section 346.66 makes the same provision for violations relating to accidents and accident reporting — §§ 346.67 to 346.70. There is no similar restriction for Criminal Code offenses.

A. "Highway."

"Highway" is defined by sec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

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Section 346.01(1m), as created by 2009 Wisconsin Act 129, provides:

> In this chapter, in addition to the meaning given in s. 340.01(22), "highway" includes a private road or driveway that is subject to an agreement for traffic regulation enforcement under s. 349.03(5).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983). That a vehicle was operated "on a highway" may be proved circumstantially. State v. Mertes, 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813.

B. "Premises held out for the public . . ."

The Committee Notes to the 1957 revision of the Motor Vehicle Code provide as follows with respect to § 346.61:

> Legislative Council Note, 1957: Most provisions of this chapter are applicable only upon highways. This section gives the sections relating to reckless and drunken driving somewhat broader applicability. They will apply in such areas as parking lots, filling stations and loading platforms. This is a change in the law, for the attorney general has ruled that the present law relating to drunken driving applies only to driving on highways. 38 Atty. Gen. 184 (1949). Broader applicability, however, is in the interest of public safety and also is consistent with § 11-101 of the UVC. [Bill 99-S]

The phrase "held out to the public" has been interpreted in three Wisconsin appellate decisions. In City of Kenosha v. Phillips, 142 Wis.2d 549, 419 N.W.2d 236 (1988), the supreme court held that the privately-owned American Motors parking lot was not "held out to the public" because it is the intent of the owner that governs. The owner's intent was to hold the lot open to its employees, but not to the general public. The statute was amended by 1995 Wisconsin Act 127 to specifically include employee parking lots.

In City of LaCrosse v. Richling, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993), the court held that the parking lot of a bar and restaurant was "held out to the public" because potential customers are part of "the public." "We believe the appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." 178 Wis.2d 856, 860. The Richling test was applied in State v. Carter, 229 Wis.2d 200, 598 N.W.2d 619 (Ct. App. 1999), to hold that a parking lot of a closed gas station was also "held out to the public."

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"The roadways of the Geneva National Community [a gated community] were 'held out to the public for use of their motor vehicles' because on any given day any licensed driver could enter the community unchallenged. . ." State v. Tecza, 2008 WI App 79, ¶22, 312 Wis.2d 395, 751 N.W.2d 896.

C. Instructing the jury.

The fact that the driving or operating took place on a highway or on "premises held out to the public . . ." is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for finding this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element.

In a case where the "highway" issue is contested, or if a case involves operating on "premises held out to the public . . .," the instruction should be modified to provide additional information to the jury. See Wis JI-Criminal 2605, PREMISES OTHER THAN HIGHWAYS, which is drafted for use with the following offenses:

- reckless driving in violation of § 346.62 [Wis JI-Criminal 2650-2654].
- operating under the influence in violation of § 346.63 [Wis JI-Criminal 2660-2669].
- failure to stop and render aid in violation of § 346.67 [Wis JI-Criminal 2670].

D. Criminal Code offenses are not limited to "highways."

Criminal Code offenses are not limited to incidents that occur on highways or any other designated premises.

II. "Motor Vehicle" and "Vehicle."

Motor Vehicle Code statutes refer to both "motor vehicles" and "vehicles" while the Criminal Code refers only to "vehicles." The definitions of the terms are slightly different.

A. Motor Vehicle Code offenses.

Most, but not all, Motor Vehicle Code offenses apply to the driving or operation of a "motor vehicle." The exceptions are offenses under § 346.63(2) involving causing injury. Those offenses apply to offenses committed by driving or operating a "vehicle." The Committee assumed that this difference was intentional on the part of the legislature, justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct — namely,

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the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

There are differences in how the two terms are defined; compare the following.

Section 340.01(35) defines "motor vehicle" as follows:

> "Motor vehicle" means a vehicle, including a combination of 2 or more vehicles or an articulated vehicle, which is self-propelled, except a vehicle operated exclusively on a rail. "Motor vehicle" includes, without limitation, a commercial motor vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails. A snowmobile and an all-terrain vehicle shall only be considered motor vehicles for purposes made specifically applicable by statute.

Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

B. Criminal Code offenses apply to "vehicles."

All Criminal Code offenses apply to operating a "vehicle." Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

This definition "clearly includes a tractor for purposes of . . . § 940.09." State v. Sohn, 193 Wis.2d 346, 360, 535 N.W.2d 1 (Ct. App. 1995).

III. "Drive" and "Operate."

Motor Vehicle Code statutes generally apply to persons who "drive or operate" while the Criminal Code generally refers to "operation or handling."

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A. Motor Vehicle Code.

Most, but not all, Motor Vehicle Code offenses are defined to apply to any person who "drives" or "operates." The exceptions are offenses under § 346.63(2) involving causing injury. Those offenses apply to offenses committed by "operating."

Section 346.63(3)(a) defines "drive" as follows:

"Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

Section 346.63(3)(b) defines "operate" as follows:

"Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

The statutory definition of "operate" was originally based on case law. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955). The definition in § 346.63(3)(b) has been interpreted in Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980); Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977); and, State v. Modory, 204 Wis.2d 538, 555 N.W.2d 399 (1996). "Operating" may be proved by circumstantial evidence — the presence of the vehicle at the gas station, the person's presence behind the wheel, his responses during questioning, the unlikelihood of the passenger's ability to operate due to his incoherent condition and the absence of any evidence the passenger was the driver. State v. Mertes, 2008 WI App 179, ¶17, 315 Wis.2d 756, 762 N.W.2d 813.

In Village of Cross Plains v. Haanstad, 2006 WI 16, ¶23, 288 Wis.2d 579, 709 N.W.2d 447, the court concluded that the defendant did not "operate" a vehicle where ". . . Haanstad was merely sitting in the driver's seat of a parked vehicle. Although the engine was running, the uncontested evidence shows that Haanstad was not the person who left the engine running. She never physically manipulated or activated the controls necessary to put the vehicle in motion."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

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B. Criminal Code.

Criminal Code offense definitions also contain an anomaly. Section 940.09, Homicide by intoxicated use of vehicle or firearm, defines the offense to apply to causing death by "the operation or handling" of a vehicle or firearm. Section 940.25, Injury by intoxicated use of a vehicle, defines the offense to apply to causing great bodily harm by "the operation" of a vehicle. The instructions for all violations of §§ 940.09 and 940.25 involving vehicles use "operate" and use the definition provided in § 346.63(3)(b), because the Criminal Code does not include a definition of the term. The instructions for violations of § 940.09 involving firearms use "handling" because the Committee concluded that it is the term that fits best with types of instrumentalities involved with those offenses.

IV. Overview: The Significance of Prior Offenses.

A. "Prior offenses" defined.

"Prior offenses" is used here as a short reference to the full statement used in the statutes: "prior convictions, suspensions, or revocations, as counted under § 343.307(1)." This includes convictions for operating while intoxicated and suspensions or revocations for refusal to submit to a chemical test for alcohol. Prior offenses from other jurisdictions are counted if the statutes are "substantially similar" or "in conformity with" Wisconsin law. For example, § 343.307(1)(a) refers to violations of a local ordinance "in conformity with" § 346.63(1). Section 343.307(1)(d) refers to convictions under the law of another jurisdiction that prohibits, for example, use of a motor vehicle while intoxicated "as those or substantially similar terms are used in that jurisdiction's laws."

In State v. List, 2004 WI App 230, 277 Wis.2d 836, 691 N.W.2d 366, the defendant argued that a prior adjudication in Illinois should not count as a "conviction" under §343.307(1)(d). His Illinois case resulted in placement on supervision which, if successfully completed, "shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime." The court of appeals disagreed, holding that §343.307(1)(d) applies to "convictions under the law of another jurisdiction that prohibits . . . use of a motor vehicle while intoxicated . . ." ¶7. It is not concerned with how the disposition is treated under the laws of that other jurisdiction. It is a conviction under the Wisconsin definition of that term: ". . . a determination that a person has violated . . . the law . . . regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction. Wis. Stat. §340.01(9r)." ¶10. However, an administrative suspension following an OWI arrest (in Missouri) does not constitute a prior offense under § 343.307. State v. Machgan, 2007 WI App 263, 306 Wis.2d 752, 743 N.W.2d 832. Also see, State v. Puchacz, 2010 WI

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App 30, 323 Wis.2d 741, 780 N.W.2d 736. [Michigan convictions for operating while visibly impaired are priors under § 343.307.]

In State v. Carter, 2010 WI 132, 330 Wis.2d 1, ___ N.W.2d ___, the Wisconsin Supreme Court held that suspensions of a driver's operating privilege under the Illinois "zero tolerance" law are convictions under § 343.307(1)(d).

B. Motor Vehicle Code offenses: The civil-criminal distinction.

The first offense for operating while intoxicated under the Motor Vehicle Code is punished as a civil forfeiture. The same conduct is punished as a crime "if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and convictions counted under s. 343.307(1) within a 10-year period equals 2 . . ." Section 346.65(2)(b). The ten-year period is "measured from the dates of the refusals or violations that resulted in the revocation or convictions." Section 346.65(2c).

Case law has resolved most of the issues raised by this penalty scheme. The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). A second offense must be charged as a crime; it may not be charged as a forfeiture offense. County of Walworth v. Rohner, 108 Wis.2d 713, 324 N.W.2d 682 (1982). An uncounseled first offense may be used as the basis for making the second offense a crime because there is no right to counsel in a forfeiture proceeding. State v. Novak, 107 Wis.2d 31, 318 N.W.2d 364 (1981).

C. As the basis for a reduced prohibited alcohol concentration [PAC].

The so-called per se offense of operating with a prohibited alcohol concentration was created by Chapter 20, Laws of 1981. After being referred to by several terms, including "blood alcohol concentration" or "breath alcohol concentration," the term presently used in the statutes is "prohibited alcohol concentration" [PAC]. See §§ 340.01(1v) and 340.01(46m).

The prohibited level was originally set at "0.10 or more" for all offenders. In 1993, the level was changed to 0.08 for persons with two or more prior offenses. 1991 Wisconsin Act 277. 1999 Wisconsin Act 109 revised the level again, reducing it to 0.02 for persons with three or more prior offenses. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08, retaining the 0.02 level for persons with three or more prior offenses.

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The existence of the prior offenses is presented as an element of the crime for offenses involving the 0.02 level. See the discussion at Section VI, below.

It is the number of priors that the person had at the time he or she drove or operated the vehicle that determines the applicable PAC level. State v. Sowatzke, 2010 WI App 81, 326 Wis.2d 227, 784 N.W.2d 700.

D. As the basis for increased penalties.

Penalties for violations of § 346.63 increase with the number of prior offenses. See § 346.65(2). Felony penalties apply as follows:

- a fourth offense is a Class H felony if the person has a prior offense within the 5-year period preceding the current offense — § 346.65(2)(am)4m.
- a fifth or sixth offense is a Class H felony — § 346.65(2)(am)5.
- a seventh, eighth, or ninth offense is a Class G felony; the confinement portion of bifurcated sentence shall be not less than three years — § 346.65(2)(am)6.
- a tenth or subsequent offense is a Class F felony; the confinement portion of bifurcated sentence shall be not less than four years — § 346.65(2)(am)7.

Penalties for violations of § 940.09 increase if the person has a prior offense. See § 940.09(1)(c). A first offense is a Class D felony. If the person has a prior, the offense is a Class C felony.

In State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981), the court held that enhanced penalties apply when the required number of convictions have accumulated within the period specified "regardless of the order in which the offenses were committed and the convictions were entered." This standard was applied in State v. Matke, 2005 WI App 4,278 Wis.2d 403, 692 N.W.2d 265, where the court held that Matke was properly sentenced for 6th offense OWI even though he had only three priors at the time he committed that offense. He was convicted of two additional OWI offenses before being sentenced on what is properly treated as a 6th offense. The court acknowledged that language in a prior decision, State v. Skibinski, 2001 WI App. 109, 244 Wis.2d 229, 629 N.W.2d 12, is arguably inconsistent with this conclusion. But the court held it was not bound by that language because it " was plainly not necessary to our disposition . . . and, indeed, was contrary to the result we reached. Moreover, because [it] . . . is inconsistent with controlling supreme court precedent, we are not obligated to apply it here." ¶16.

Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact

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that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

E. Collateral attack on prior convictions.

Convictions used to provide the basis for the penalty for third and subsequent offenses are subject to collateral attack in the prosecution for the current offense. See, State v. Foust, 214 Wis.2d 567, 570 N.W.2d 605 (Ct. App. 1997). The same should be true for convictions used to support the application of the 0.02 level of alcohol concentration. The only defect that may be raised is denial of the right to counsel at the time of a prior criminal conviction. See SM-16, COLLATERAL ATTACK ON PRIOR CONVICTIONS.

V. Operating With a Prohibited Alcohol Concentration.

A. Changes in the prohibited level.

The so-called per se offense of operating with a prohibited alcohol concentration [PAC] was created by Chapter 20, Laws of 1981. After being referred to by several terms, including "blood alcohol concentration" or "breath alcohol concentration," the term presently used in the statutes is "prohibited alcohol concentration."

The level was originally set at 0.10 or more. In 1993, the level was changed to 0.08 for persons with two or more prior convictions, refusals, etc. 1991 Wisconsin Act 277. 1999 Wisconsin Act 109 revised the level again, reducing it to 0.02 for persons with three or more priors. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08, retaining 0.02 for the person with three or more priors.

B. "Prohibited alcohol concentration" defined.

Section 340.01(46m), as amended by 2003 Wisconsin Act 30, reads as follows:

(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

[(b) — repealed]

(c) If the person is subject to an order under § 343.301 or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

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The reference to a person "subject to an order under § 343.301" was added by 2009 Wisconsin Act 100. [Effective date: July 1, 2010.] It means that persons required to install an ignition interlock device under § 343.301 are subject to the reduced PAC level of 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

(1v) "Alcohol concentration" means any of the following:
(a) The number of grams of alcohol per 100 milliliters of a person's blood.
(b) The number of grams of alcohol per 210 liters of a persons's breath.

C. The constitutionality of the "per se" offense.

The constitutionality of penalizing the "status" of having an alcohol concentration of 0.10% or more was upheld in State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984):

> . . . . [a] person of common intelligence can, with a fair degree of definiteness, believe himself or herself to be in jeopardy of violating the statute if a significant quantity of alcohol has been consumed. . . . That is the point at which they are on notice — they have "clear warning" that if they drive, they do so at their own risk. 118 Wis.2d 502, 508-09.

In State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989), the court held that § 346.63(1) defines a per se breath alcohol offense and is constitutional in doing so. Individuals are not free to litigate the "partition ratio" that is used to calculate the prohibited breath alcohol level.

D. PAC level and penalties for third and subsequent offenses.

Section 346.65(2)(g) provides for increased fines for OWI offenders with three, four, five, or six priors. The level of increase depends on the alcohol concentration level:

- 0.17 to 0.199 minimum and maximum fines are doubled.
- 0.20 to 0.249 minimum and maximum fines are tripled.
- 0.25 or more minimum and maximum fines are quadrupled.

Because the alcohol concentration level increases the maximum fine, which is part of the criminal penalty for the offense, the Committee concluded that it is a fact which must be submitted to the jury. "Other than the fact of a prior conviction, any fact that increases the

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penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

The Committee recommends handling the penalty-increasing factors by submitting an additional question after the instruction on the operating under the influence or operating with a prohibited alcohol concentration offense is given. See Wis JI-Criminal 2663C ALCOHOL CONCENTRATION LEVEL.

VI. Prior Offenses/Being Subject To An Ignition Interlock Order as an Element of the 0.02 Offense.

Until the generally applicable PAC level was changed from 0.10 to 0.08, the level was reduced to 0.08 for those offenders with two or more priors. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08 and retained 0.02 for the person with three or more priors. See § 340.01(46m)(c). Because priors reduce the applicable PAC level, the same issues arise under current law with respect to offenses involving the 0.02 level that applied under prior law to 0.08 offenses.

The most difficult issue originally posed to the Committee by the definition of "prohibited alcohol concentration" was whether the fact of prior offenses was a fact that must be submitted to the jury. The Committee concluded that it was a fact for the jury but recognized that this may create practical problems.

The Committee's conclusion was confirmed by the decision in State v. Ludeking, 195 Wis.2d 132, 138, 536 N.W.2d 119 (Ct. App. 1995), which held that the fact of prior convictions was an element of the "0.08" offense:

> The plain language of § 340.01(46m)(b), defines 'prohibited alcohol concentration' to include two separate components: (1) percentage of blood alcohol concentration . . . , and (2) number of prior convictions [or suspensions or revocations]. (Emphasis in original.)

The court also acknowledged the potential for prejudice that exists when the defendant's prior record is presented to the jury but pointed to the cautionary paragraph included in the standard instruction as a way to offset that prejudicial impact. See Section VI., C., below.

The Committee reached the same decision with respect to the person being subject to an ignition interlock order. See Wis JI-Criminal 2660D, where being subject to an order under § 343.301 is included as a bracketed third element. It is not to be submitted to the jury if the defendant admits being subject to the order.

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A. State v. Alexander: Stipulation to the "status element."

The potential for prejudice was addressed, and eliminated in many cases, by the Wisconsin Supreme Court's decision in State v. Alexander, 214 Wis.2d 627, 571 N.W.2d 662 (1997). In Alexander, the court referred to the prior offenses element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions, or revocations, the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 627, 645. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 627, 650. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 627, 648-49.

The court gave explicit direction to the trial courts as to how to handle this situation:

> When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The "prohibited alcohol concentration" means 0.08 . . .
> 214 Wis.2d 627, 650-51.

The Committee originally implemented the approach approved in Alexander by placing the "status element" in brackets in the instructions for 0.08 offenses. If the defendant admitted the "status element," the instruction was to be given with two elements: driving or operating a motor vehicle; and having an alcohol concentration of more than 0.08. If the defendant did not admit the "status element," the instruction was to be given with a third element: having two or more prior convictions, suspensions, or revocations as counted under § 343.307(1).

The same approach is now recommended in the instructions for the 0.02 offenses. See, for example, Wis JI-Criminal 2660C.

Regarding stipulations, see Wis JI-Criminal 162A Law Note: Stipulations.

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B. Defining the priors for the jury.

The jury instructions adopted the language of the statute by wording the applicable elements as follows:

> 3. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).
> [See, for example, Wis JI-Criminal 2660C.]

The reference to "as counted under § 343.307(1)" is not completely satisfactory, but the Committee could not develop a better alternative. Section 343.307(1) contains six subsections detailing the kind of prior convictions, suspensions, or revocations that are to be counted. Some of these subsections have their own cross-references to other statutes. Generally, what counts are prior convictions for operating while intoxicated and prior suspensions or revocations for refusal to take a chemical test for alcohol. Offenses in other jurisdictions may count if the laws of the jurisdiction are "substantially similar to" or "in conformity with" Wisconsin law. See Section IV.,A., above.

All of this is too technical to submit to the jury. The Committee concluded that a simple reference to § 343.307(1) was the best way to proceed. It is assumed that evidence will be presented that the person's driving record shows the requisite number of prior offenses "as counted under § 343.307(1)" and thus the reference to the statute will be familiar to the jury.

C. Minimizing prejudice to the defendant.

If the prior offenses are submitted to the jury, there is a risk of unfair prejudice to the defendant. The instructions suggest that at the defendant's request, a cautionary instruction be given that limits the jury's use of the potentially prejudicial evidence to its proper purpose. (See § 901.06 which requires that a cautionary instruction be given upon request whenever evidence is admitted for a limited purpose.) The suggested instruction is modeled after those used in similar situations and provides as follows:

> Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.
> Wis JI-Criminal 2660C.

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Of course, there are doubts about the efficacy of cautionary instructions like this. Defendants may prefer to keep the evidence from being admitted altogether. That option is now possible if there is an admission of the "status element" per the Alexander decision. See the discussion in VI.,A., above.

D. Being Subject To An Ignition Interlock Order

Like having three or more prior offenses, being subject to an ignition interlock order under § 343.301 reduces the PAC level to "more than 0.02." The Committee concluded that the fact of being subject to an order under § 343.301 should be handled in the same way as the facts of having three or more prior offenses. See Wis JI-Criminal 2660D.

VII. Alcohol Test Results; Evidence of Test Refusal.

A. Admissibility.

The basis for admissibility of alcohol test results is § 885.235(1g), which reads in part as follows:

> (1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle . . . evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect: . . .

The instructions contain the following statement, intended to address the admissibility issue:

> The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).
> [See, for example, Wis JI-Criminal 2663.]

Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235.

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Test results from a test taken more than three hours after operating may be admissible and may be accorded evidentiary significance if there is sufficient support from expert testimony. State v. Fonte, 2005 WI 77, 281 Wis.2d 654, 698 N.W.2d 594.

B. Instructing on evidentiary significance.

Section 885.235 provides the statutory authority for according evidentiary significance to alcohol test results. The subsection generally applicable to operating while intoxicated offenses is § 885.235(1g)(c), which reads as follows:

> The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

There is a gap in the authority provided by the statute: it does not address the prima facie effect of test results of 0.02 or more, which would be relevant for offenders with three or more priors, or who are subject to an ignition interlock order, who are charged with the "more than 0.02" offense.

The instructions for more than 0.08 and under the influence offenses advise the jury that a test result showing a prohibited alcohol concentration is sufficient evidence upon which to base a finding that the person was under the influence or had that alcohol concentration at the time of the driving. But the jury is also advised that they are not required to make that finding and that they may do so only if they are so satisfied beyond a reasonable doubt from all the evidence in the case. In the Committee's judgment, this is the type of instruction required by Wis. Stat. § 903.03, which governs jury instructions on "presumptions" and "prima facie evidence."

Instructions for 0.02 offenses contain only the general reference to test results being admissible because § 885.235 does not accord test results showing more than 0.02 any prima facie effect.

C. The blood-alcohol curve.

The presence of a prohibited alcohol concentration at the time of operation is the significant issue. The relevance of a test result showing a prohibited alcohol concentration at some time after operation will vary, depending on many factors, including the person's physical condition, what the person had to eat, what the person drank, the length of time over

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which the drinks were consumed, etc. The problem of the so-called blood-alcohol curve is discussed in State v. Vick, 104 Wis.2d 678, 312 N.W.2d 489 (1981).

Vick presented a situation where the defendant claimed his blood was absorbing alcohol at the time he was arrested and that therefore the blood alcohol concentration had not reached the prohibited level at the time of driving but only reached that level later at the time of the test. If the evidence in a case presents this problem, the instruction on the prima facie effect of test results may not be appropriate since there may be no "rational connection" between the alcohol concentration at the time of the test and a prohibited alcohol concentration at the time of driving. (See Ulster Co. v. Allen, 442 U.S. 140 (1979), for a discussion of the "rational connection" requirement when instructing the jury on statutory presumptions.)

The Committee concluded that where there is a problem with the "blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it "prima facie effect." The following is recommended:

> Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received. This is relevant evidence that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating). Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it just such weight as you determine it is entitled to receive.
> Wis JI-Criminal 234, BLOOD-ALCOHOL CURVE.

In State v. Fischer, 2010 WI 6, 322 Wis.2d 265, 778 N.W.2d 629, the defendant sought to introduce an expert's opinion testimony, based in part on the results of a preliminary breath test, to support a blood alcohol curve argument. The court held that the testimony was properly excluded:

> Wisconsin Stat. § 343.303 expressly bars PBT results in OWI cases, and to allow Wis. Stat. § 907.03 to trump that prohibition would simply nullify that provision and would consequently present a variety of needless obstacles to the investigation, prosecution, and defense of drunk driving cases. ¶4.

The court held that exclusion does not violate the defendant's constitutional right to present a defense because, even assuming the evidence is relevant and necessary, ". . . in an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion

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that is based in part on PBT results, the right to do so is outweighed by the State's compelling interest to exclude that evidence." ¶5.

Fischer was granted relief as a result of his petition for habeas corpus relief in federal court. Fischer v. Ozaukee County Circuit Court, 10-C-553, E.D. Wis. Sept. 29, 2010. The federal magistrate judge concluded that "the Wisconsin Supreme Court's decision affirming the exclusion of Fischer's expert's testimony involved an unreasonable application of federal law." Slip opinion, page 18. The state's motion to alter or amend that judgment was denied. Fischer v. Van Hollen, 10-C-553, E.D. Wis. Jan. 7, 2011.

D. Reliability of testing devices.

The instructions include the following paragraph regarding the reliability of the standard devices used to test breath or blood samples for alcohol concentration:

> The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person. [See, for example, Wis JI-Criminal 2663.]

The intent of the paragraph is to advise the jury that the state need not prove the reliability of the underlying principles upon which the breath test is based. The reliability of those principles has been satisfactorily established so that evidence of test results is admissible without a preliminary establishment in every case that those principles are valid. The testing device involved must be one whose reliability has been established. See Chapter Trans. 311, Wis. Admin. Code.

This concept is sometimes referred to as a "prima facie presumption of reliability (or accuracy)," see, for example, City of Madison v. Bardwell, 83 Wis.2d 891, 900, 266 N.W.2d 618 (1978); State v. Trailer Service, Inc., 61 Wis.2d 400, 407, 212 N.W.2d 683 (1973); and State v. Neitzel, 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980). The Committee concluded that the jury should not be instructed in terms of a "presumption" but should simply be advised that the validity of the underlying scientific principles need not be established. However, the jury must be satisfied that the test procedure was proper and that the operator was qualified, and the defendant may challenge the test results on those grounds. West Allis v. Rainey, 36 Wis.2d 489, 496, 153 N.W.2d 514 (1967).

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The presumption of accuracy also applies to the test results of the "Intoximeter 3000." State v. Dwinnell, 119 Wis.2d 305, 349 N.W.2d 739 (Ct. App. 1984).

The state is not required affirmatively to prove compliance with the procedures spelled out in the Wisconsin Administrative Code (Trans. 311.05 - 311.09) as a foundation for the admission of breathalyzer test results. City of New Berlin v. Wertz, 105 Wis.2d 670, 314 N.W.2d 911 (Ct. App. 1981). However, the jury should be afforded the opportunity to weigh alleged failures to conform with standards and regulations in determining the weight to accord the breathalyzer results. Wertz, at 677. The required procedures for test device certification are discussed in County of Dane v. Winsand, 2004 WI App 86, 271 Wis.2d 786, 679 N.W.2d 885.

E. The alcohol concentration chart.

Challenges to the accuracy of test results sometimes involve reliance on the DOT-published chart estimating blood alcohol concentration by reference to the number of drinks consumed, adjusted for body weight and time. The chart is admissible in drunk driving cases. State v. Hinz, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984). For an instruction on the use of the chart, see Wis JI-Criminal 237, ALCOHOL CONCENTRATION CHART.

F. Evidence of test refusal.

In State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980), the court of appeals reaffirmed that evidence of a defendant's refusal to take a chemical test was relevant and constitutionally admissible in a drunk driving prosecution. "A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to taking an alternative test." 98 Wis.2d 663, 668-69. The evidence being relevant and there being no right to refuse to take a test, the court held there was no rationale for prohibiting comment on the refusal.

Previous decisions of the Wisconsin Supreme Court had reached the same conclusion, see State v. Draize, 88 Wis.2d 445, 276 N.W.2d 784 (1974); City of Waukesha v. Godfrey, 41 Wis.2d 401, 164 N.W.2d 314 (1969); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956); and City of Barron v. Covey, 271 Wis. 10, 72 N.W.2d 387 (1955).

The defendant's explanation for the refusal is also admissible. Since the relevance of the refusal is that it tends to indicate a consciousness of guilt,

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> [t]he corollary of that rule is that any evidence that tends to rebut or diminish the force of that permissible inference is also relevant, for it tends to make less probable the fact of intoxication — a fact of consequence in this action, and, therefore, equally admissible. Thus, evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test.

State v. Bolstad, 124 Wis.2d 576, 585-86, 370 N.W.2d 576 (1985).

In State v. Mallick, 210 Wis.2d 427, 565 N.W.2d 245 (Ct. App. 1997), the court held that evidence of refusal to perform field sobriety tests was admissible.

In South Dakota v. Neville, 459 U.S. 553 (1983), the U.S. Supreme Court upheld the admissibility of evidence of test refusal. The Court did not base its decision on the distinction that refusal is a physical, rather than a testimonial, act. Instead, the Court held that admissibility does not violate the 5th Amendment privilege against self-incrimination because no impermissible coercion is involved: ". . . a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and this is not protected by the privilege against self-incrimination." 459 U.S. 553, 564. The defendant in Neville also argued that the due process clause prohibited reference to the refusal because he was not specifically warned that his refusal could be used against him at trial. The Court rejected this argument as well, holding that the "failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly 'trick' respondent if the evidence were later offered against him at trial," 459 U.S. 553, 566.

See Wis JI-Criminal 235, REFUSAL OF DEFENDANT TO FURNISH SAMPLE FOR ALCOHOL TEST.

VIII. Defining "Under the Influence."

A. Definition for Motor Vehicle Code offenses.

The presently published instructions for Motor Vehicle Code offenses use the following definition of "under the influence":

> "Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.

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Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.
Wis JI-Criminal 2663.

Modifications of this definition are routinely requested and tend to focus on three related issues:

- adding the phrase ". . . to a degree which renders him or her incapable of safely driving";
- adding "materially" to modify the word "impaired"; and,
- restoring a longer, two-paragraph, explication of "under the influence" which is generally attributed to Fond du Lac v. Hernandez, a 1969 decision of the Wisconsin Supreme Court.

B. "Incapable of safely driving."

There is undeniably a reasonable basis for the argument that "incapable of safely driving" is an appropriate addition to the definition. It is seemingly supported by the statutory language as it now appears in § 346.63(1)(a) and by case law that quotes or restates the statute.

§ 346.63(1)(a) reads as follows:

(1) No person may drive or operate a motor vehicle while:
(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or . . .

Despite this apparent textual basis, the Committee has concluded that "incapable of safely driving" does not apply to cases involving operating under the influence of "an intoxicant,

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a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog."

The Committee has interpreted the statute as presenting three options, each represented by a clause in the statute that begins with "under the influence." The three separate options are:

- under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog;

- under the influence of any other drug to a degree which renders him or her incapable of safely driving;

- under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

Under this reading of the statute, the "incapable of safely driving" phrase applies only to offenses involving the second two options — those involving the influence of a drug or the combined influence of an intoxicant and a drug.

The Committee's grammatical construction is supported by the legislative history. The references to "incapable of safely driving" were added to § 346.63(1)(a) by 1983 Wisconsin Act 459. Before the 1983 revision, Wisconsin had a relatively simple statute:

> **346.63 Operating under influence of intoxicant. (1)** No person may drive or operate a motor vehicle while:
> (a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance; or
> (b) The person has blood alcohol concentration of .10% or more . . . .
> Section 346.63, 1981-82 Wis. Stats.

The amendment made to sub. (1)(a) by 1983 Wisconsin Act 459 is shown below, with the new language underscored:

> (a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, <u>under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving</u>; or . . .

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The Committee considered this to be strong support for its grammatical construction of the statute and reflected its conclusion in the published instructions by omitting "incapable of safely driving" from the regular under the influence instructions but including it in Wis JI-Criminal 2666, which is drafted for under the influence of a drug offenses. The conclusion was explained in a footnote to Wis JI-Criminal 2666, but was not referred to in the other instructions.

At least two appellate decisions have quoted the statute or paraphrased it in a way that suggests that "incapable of safely driving" applies to "under the influence of an intoxicant" cases. See, State v. Waalen, 130 Wis.2d 18, 27,386 N.W.2d 47 (1986); and, County of Jefferson v. Renz, 222 Wis.2d 424, 444, 588 N.W.2d 267 (Ct. App. 1998), reversed on other grounds, 231 Wis.2d 293, 603 N.W.2d 541 (1999). In neither of these cases was the specific statutory interpretation issue considered on its merits or necessary to the decision. The Committee concluded that these two references were not a sufficient basis for changing the interpretation described above.

The Committee's conclusion that "incapable of safely driving" does not apply to the regular definition of "under the influence" was adopted in State v. Hubbard, 2008 WI 92, ¶52, 313 Wis.2d 1, 752 N.W.2d 389: "The phrase 'to a degree which renders him incapable of safely driving' does not affect the definition of 'under the influence' in the Criminal Code."

C. "Materially" impaired.

The presently published instructions present a seeming inconsistency. Those for Motor Vehicle Code offenses define "under the influence" by stating that "the defendant's ability to operate a vehicle was impaired . . ." Those for Criminal Code offenses define "under the influence" by stating that "the defendant's ability to operate a vehicle was materially impaired . . ." [Emphasis added]. This state of affairs has a long history; the basic steps are set forth below.

"Under the influence" is not defined in the Motor Vehicle Code, but is defined in the Criminal Code as "materially impaired". See § 939.22(42). Before 1978, the instructions for Motor Vehicle Code offenses used a definition based on case law from other states. [This definition was implicitly approved in Fond du Lac v. Hernandez. See Section VIII., D., below.] At that time, there was only one Criminal Code drunk driving crime (Homicide By Intoxicated Use . . .) and it used the § 939.22(42) definition.

In 1978, the Motor Vehicle Code instructions were revised, the Criminal Code instruction was revised, and a new Criminal Code instruction was added, for Injury [Great Bodily Harm] By Intoxicated Use . . . in violation of § 940.25. All the instructions used the

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same, case-law-based, definition previously used only in the Motor Vehicle Code instructions.

In 1982, a question was raised about the propriety of using the case law definition for Criminal Code offenses because it could be interpreted as stating a less demanding test than that required by the "materially impaired" standard set forth in § 939.22(42). This led the Committee to conclude that there was no reason to have different definitions for Motor Vehicle Code and Criminal Code offenses because crimes were defined in both Codes in identical language. The Committee decided that because "under the influence" was defined in the Criminal Code, that definition should also be used for Motor Vehicle Code offenses. [The Committee was aware that a Criminal Code definition does not automatically apply outside the Criminal Code, but thought it was sensible to use it in this situation.]

So the Committee adopted a new definition of "under the influence" in 1982 applicable to all drunk driving offenses and including "materially impaired." In an attempt to provide some guidance to the jury on the meaning of that phrase, the new instruction included the following:

> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially, that is substantially, impaired.
> Wis JI-Criminal 2663, c. 1982.

The 1982 revision was not universally acclaimed. Several judges contacted the Committee to express dissatisfaction with it, but the Committee was not convinced that it should be changed. The issue reached the Wisconsin appellate courts when a trial judge declined to use the definition in the published instruction for a Motor Vehicle Code case, using instead the pre-1982 definition. The defendant appealed, claiming that it was error to fail to include "materially impaired." The Wisconsin Court of Appeals affirmed, holding that the definition used by the trial court correctly stated the law and that the Criminal Code definition did not apply to Motor Vehicle Code offenses. State v. Waalen, 125 Wis.2d 272, 371 N.W.2d 401 (Ct. App. 1985). The Wisconsin Supreme Court affirmed on slightly different grounds, holding that the definition for Motor Vehicle Code offenses is equivalent to the Criminal Code definition but that the Committee erred in equating "materially" with "substantially":

> Requiring "substantial impairment" of an individual's ability to operate a vehicle before that person could be found "under the influence" would be inconsistent with the expressed legislative intent because it would not provide maximum safety for all users of state highways. Rather, "material impairment" under sec. 939.22(42), Stats.,

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exists when a person is incapable of driving safely, or "is without proper control of all those faculties . . . necessary to avoid danger to others."
State v. Waalen, 130 Wis.2d 18, 27, 386 N.W.2d 47 (1986) (citations omitted)

In response to Waalen, the Committee revised the Motor Vehicle Code instructions to delete reference to "materially," with a footnote indicating that the decision appeared to approve the use of that term for Motor Vehicle Code offenses. The Committee concluded that use of "materially" invited definition but that it could not be helpfully defined without running afoul of the legislative intent recognized in Waalen. The Criminal Code instructions continued to use "materially" because it is part of the Criminal Code definition of "under the influence," but deleted reference to "substantially."

In State v. Hubbard, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839, the court concluded that the trial court did not err in responding to a jury question about the meaning of "materially impaired." The trial court told the jury to give the words their plain and ordinary meaning and declined to respond with language from Waalen to which the prosecution had objected. The supreme court affirmed: ". . . Hubbard's argument that 'the Waalen language' defined 'materially impaired' to give the term a 'technical' or 'peculiar' meaning in the context of criminal law is untenable." 2008 WI 92, ¶54.

D. Fond du Lac v. Hernandez: Case law definition.

The third issue relates to two paragraphs that are attributed to Fond du Lac v. Hernandez, 42 Wis.2d 473, 167 N.W.2d 408 (1969). In fact, equivalent material appeared in the uniform instructions from 1966 until 1982 and it was that definition that was used in the Hernandez case. It read as follows:

> The expression "under the influence of an intoxicant" covers not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors (including beer) and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.
>
> A person who is even to the slightest extent under the influence of an intoxicant in the common and well-understood acceptation of the term is — to some degree at least — less able either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern motor vehicle with safety to himself and the public. Not every man who has consumed alcoholic beverages falls within the ban of the (statute) (ordinance). If that consumption of alcoholic beverages does not cause him

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to be influenced in the ordinary and well-understood meaning of the term, he is not under the influence of an intoxicant within the meaning of the statute.
Wis JI-Criminal 2663, c. 1966.

The instruction given by the trial court in the Waalen case was based on these two paragraphs, omitting only the first sentence of the second paragraph. In reviewing that instruction, the supreme court quoted the full Hernandez version and stated that in Hernandez, "[w]e rejected Hernandez's challenge to the instruction, implicitly affirming the validity of the language of the instruction." State v. Waalen, 130 Wis.2d 18, 26, 386 N.W.2d 47 (1986).

[NOTE: At the risk of providing more detail than anyone needs, the apparent original source of the two paragraphs is Hasten v. State, 35 Ariz. 427, 280 Pac. 670 (1929), where they are part of a longer discussion of the meaning of "under the influence." Hasten was referred to on another issue in Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955), and was extensively quoted in the state's brief in that case.]

As mentioned above, the Committee made major changes in these two paragraphs in the 1982 version of the instruction at the same time that "materially" was added. The two changes influenced one another: the two paragraphs were believed to communicate a less stringent standard than that required by "materially impaired." They were edited and reorganized to yield the two paragraphs that are in the current instructions:

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.
Wis JI-Criminal 2663, c. 1993.

The Criminal Code instructions use these paragraphs, but add "materially" before "impaired" in the last sentence.

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IX. Operating With a Detectable Amount of a Restricted Controlled Substance.

2003 Wisconsin Act 97 created or amended nine statutes to provide that no person may drive or operate a motor vehicle while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood." The statute applies to offenses committed on or after the Act's effective date: December 19, 2003.

A. Statutes affected.

The new or amended statutes are:

- § 346.63(1)(am): driving or operating
- § 346.63(2)(a)3.: causing injury
- § 940.09(1)(am): causing death
- § 940.09(1)(cm): causing death of an unborn child
- § 940.09(1g)(am): causing death by handling a firearm
- § 940.09(1g)(cm): causing death of an unborn child by handling a firearm
- § 940.25(1)(am): causing great bodily harm
- § 940.25(1)(cm): causing great bodily harm to an unborn child
- § 941.20(1)(bm): operating or going armed with a firearm

There are three published instructions for "detectable amount" cases:

- Wis JI-Criminal 2664B for violations of § 346.63(1)(am);
- Wis JI-Criminal 1266 for violations of § 940.25(1)(am); and,
- Wis JI-Criminal 1187 for violations of § 940.09(1)(am).

B. "Restricted controlled substance" defined.

"Restricted controlled substance" is defined as follows in § 340.01:

(50m) 'Restricted controlled substance' means any of the following:
(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

[The same definition is found in several other statutes. See, for example, § 939.22(33).

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C. Valid prescription defense.

All the statutes recognizing the "detectable amount . . ." offense also recognize a defense for cases involving "a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol" that applies if the person proves, by a preponderance of the evidence, that he or she had a valid prescription for the substance. See, for example, § 346.63(1)(d).

D. Constitutionality.

Two decisions of the Wisconsin Court of Appeals have upheld the constitutionality of the "detectable amount" statutes.

In State v. Smet, 2005 WI App 263, 288 Wis.2d 525, 709 N.W.2d 474, the court held that § 346.63(1)(am) does not overstep the state's police power by not requiring any showing of impairment. The "legislature reasonably and rationally could have determined that, as a class, those who drive with unprescribed illegal chemicals in their blood represent a threat to public safety." ¶16. Further, the statute is not fundamentally unfair and does not offend principles of equal protection.

In State v. Gardner, 2006 WI App 92, 292 Wis.2d 682, 715 N.W.2d 720, the court held that §940.25(1)(am) is constitutional. It does not create a "presumption of guilt" or create a "status offense." The court noted that "cases across the country challenging this same issue are repeatedly resolved in favor of upholding the legislative action. . . . We join those jurisdictions in concluding that our legislature acted reasonably when it created an offense prohibiting operation of a vehicle with any amount of a controlled substance in one's system." ¶20.

X. Offenses Involving Injury or Death: The Affirmative Defense.

Both the Motor Vehicle Code and the Criminal Code define offenses involving causing harm by operating while intoxicated. See § 346.63(2), causing injury, § 940.09, causing death, and § 940.25, causing great bodily harm. Each of the statutes also provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the [harm] would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . . or did not have a prohibited alcohol concentration . . ." The defense is addressed in the instructions by providing an alternative ending for use in cases where there is "some evidence" of the defense.

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The 2004 revision of the instructions incorporated the defense into the offense instructions. It had formerly been addressed in separate instructions: Wis JI-Criminal 2662 for Motor Vehicle Code offenses and Wis JI-Criminal 1188 for Criminal Code offenses. Those instructions have been withdrawn.

A. Constitutionality.

The affirmative defense was added to the statutes by Chapter 20, Laws of 1981, which eliminated the requirement that "causal negligence" be established in addition to operating while under the influence. See, §§ 346.63(2), 940.09, and 940.25, 1979 Wis. Stats. The Committee concluded at that time that the intent of the legislature was to remove any required causal connection between the harm and any negligence by the defendant or the defendant's being under the influence. Thus, the instructions tried to make it clear that only simple operation must be causal, not operation under the influence, and not negligent operation. Trying to explain this concept to the jury without creating confusion is difficult. The following paragraph was included in the body of earlier versions of the instructions. Because some found the statement confusing, it was moved to the footnotes, to be used by those who believe it adds clarity.

> It is not required that the [harm] was caused by any drinking of alcohol or by any negligent or improper operation of the vehicle. What is required is that the [harm] was caused by the defendant's operation of the vehicle.

The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). [The U.S. District Court for the Western District of Wisconsin reached the same conclusion, using a slightly different analysis; see, Caibaiosai v. Barrington, 643 F.Supp. 1007 (W.D. Wis. 1986).] Caibaiosai involved § 940.09, but the other offenses are defined in an identical manner.

The defense is closely related to the cause element of these offenses but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of harm. If the defendant's operation caused the harm, the defense allows the defendant to avoid liability if it is established that the harm would have occurred even if the defendant had not been under the influence and had been exercising due care. This distinction is essential to the conclusion that the affirmative defense is constitutional: the defense must relate to an issue that is not covered by the offense definition. See, Caibaiosai, supra, and Patterson v. New York, 432 U.S. 197 (1977).

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The phrase "had been exercising due care" was added to the defense by 1989 Wisconsin Act 275.

B. The substance of the defense.

The Caibaiosai decision held that the defense provided in § 940.09(2) "is meant to provide a defense for the situation where there is an intervening cause between the intoxicated operation of the automobile and the death of an individual." 122 Wis.2d 587, 596. A footnote to the quoted material cited the Black's Law Dictionary definition of "intervening cause": "In criminal law, a cause which comes between an antecedent and a consequence; it may be either independent or dependent, but in either case it is sufficient to negate criminal responsibility." 122 Wis.2d 587, 596, n. 4.

A different definition of "intervening cause," based on State v. Nester, 336 S.E.2d 187, 189 (W.Va. 1985), was adopted by the Wisconsin Court of Appeals in State v. Turk, 154 Wis.2d 294, 296, 453 N.W.2d 163 (Ct. App.):

> An intervening cause is a new and independent force which breaks the causal connection between the original act or omission and the injury, and itself becomes the direct and immediate cause of the injury. The fact that the victim did not take precautionary steps which may have prevented his eventual demise is not an intervening cause.

In the Turk case, a defendant charged with causing great bodily harm by operating a vehicle while under the influence of an intoxicant under § 940.25 claimed that the injury was caused by the victim's failure to wear seat belts. Turk upheld the trial court's determination that the failure to wear seat belts was irrelevant to the defense, relying on the above rule.

C. Burden of persuasion.

The statutes expressly place the burden on the defendant to prove the defense "by a preponderance of the evidence." The instructions describe the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

D. Conduct of the victim.

The instructions recognize that evidence of the conduct of the victim may be relevant to the affirmative defense and provide the following for use in that kind of case:

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Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the [harm] would have occurred even if the defendant had not been under the influence and had been exercising due care.
[See, for example, Wis JI-Criminal 1185.]

This was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to relate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense, to the affirmative defense. Although Lohmeier dealt with a Criminal Code case, the Committee concluded that its holding would also apply to Motor Vehicle Code offenses under § 346.63(2), so all offenses involving the causing of harm address the defense the same way.

The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the paragraph is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted.

XI. Two-Charge Cases.

Both Motor Vehicle Code and Criminal Code offenses apply to operating under the influence and with a prohibited alcohol concentration. In each instance, there is statutory

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authority for charging two counts based on the same incident and submitting those counts to the jury. For example, § 346.63(1)(c) provides:

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence. If the person is charged with violating any combination of par. (a), (am), or (b), the offenses shall be joined. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under §§ 343.30(1q) and 343.305. Paragraphs (a), (am), and (b) each require proof of a fact for conviction which the others do not require.

The constitutionality of this two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation that there be only one conviction. Also see, State v. Raddeman, 2000 WI App 190, 238 Wis.2d 628, 618 N.W.2d 258.

Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed.

Wis JI-Criminal 2668 is intended to serve as a model for forfeiture cases where two charges based on the same incident are submitted to the jury: one alleging operating under the influence in violation of § 346.63(1)(a); the other alleging operating with a prohibited alcohol concentration in violation of § 346.63(1)(b). It is a combination of Wis JI-Criminal 2660A and Wis JI-Criminal 2663A and attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. Wis JI-Criminal 2669 provides a similar model for criminal charges under § 346.63.

A model is also published for violations of § 940.09 involving two charges. See Wis JI-Criminal 1189, which can be adapted for use for violations of § 940.25.

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COMMENT

This Introductory Comment was originally published as Wis JI-Criminal 2660-2665 in 1982 and revised in 1986, 1993, 1998, and 2004. The 2004 revision renumbered it as Wis JI-Criminal 2600. This revision was approved by the Committee in February 2011.

This Introductory Comment was first published in 1982 to outline the major changes in Wisconsin's drunk driving law made by Chapters 20 and 184, Laws of 1981, and was revised periodically to outline additional statutory changes. The 2004 revision changed its approach, setting it up as a collection of all explanatory material relating to "operating while intoxicated offenses" — those in the Motor Vehicle Code and in the Criminal Code. Footnotes to instructions for specific offenses refer to material contained here.

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2605 PREMISES OTHER THAN HIGHWAYS — §§ 346.61, 346.66

[WHERE OPERATION ON PREMISES OTHER THAN A HIGHWAY IS INVOLVED, SUBSTITUTE THE FOLLOWING, AS APPROPRIATE, FOR THE FIRST ELEMENT OF THE INSTRUCTION][1]

1. The defendant (drove) (operated) a motor vehicle on

[premises held out to the public for use of their motor vehicles.][2]

[premises provided by employers to employees for the use of their motor vehicles.][3]

[premises provided to tenants of rental housing in buildings of four or more units for the use of their motor vehicles.][4]

[ADD WHEN SUPPORTED BY THE EVIDENCE][5]

[Operating a vehicle in a private parking area at a farm or single-family residence does not satisfy this element.]

COMMENT

Wis JI-Criminal 2605 was originally published in 1996 and amended in 2004. This revision updated the Comment and was approved by the Committee in February 2011.

This instruction is intended to address alternatives to "operation on a highway" for the following offenses:

- reckless driving in violation of § 346.62 [Wis JI-Criminal 2650-2654];
- operating under the influence in violation of § 346.63 [Wis JI-Criminal 2660-2669]; and,
- failure to stop and render aid in violation of § 346.67 [Wis JI-Criminal 2670].

The premises on which those offenses may be committed are specified in §§ 346.61 and 346.66, both of which were amended by 1995 Wisconsin Act 127. [Effective date: January 6, 1996]. The "on highway requirement" is also discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. I.

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Section 346.01(1m), as created by 2009 Wisconsin Act 129, provides:

In this chapter, in addition to the meaning given in s. 340.01(22), "highway" includes a private road or driveway that is subject to an agreement for traffic regulation enforcement under s. 349.03(5).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983). That a vehicle was operated "on a highway" may be proved circumstantially. State v. Mertes, 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813.

1. Sections 346.61 and 346.66 define the applicability of sections relating to reckless and drunken driving [§§ 346.62 to 346.64] and relating to accidents and accident reporting [§§ 346.67 to 346.70]. The first element of instructions for those offenses typically includes the requirement that the operation take place "on a highway." This instruction provides alternatives for cases where the operation takes place on premises other than highways as defined in §§ 346.61 and 346.66. Care should be taken that the restatement of the first element includes any additional facts that may be in that element.

2. The phrase "held out to the public" has been interpreted in three Wisconsin appellate decisions. In City of Kenosha v. Phillips, 142 Wis.2d 549, 419 N.W.2d 236 (1988), the supreme court held that the privately-owned American Motors parking lot was not "held out to the public" because it is the intent of the owner that governs. The owner's intent was to hold the lot open to its employees, but not to the general public. The statute was amended by 1995 Wisconsin Act 127 to specifically include employee parking lots. See note 3, below.

In City of LaCrosse v. Richling, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993), the court held that the parking lot of a bar and restaurant was "held out to the public" because potential customers are part of "the public." "We believe the appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." 178 Wis.2d 856, 860. The Richling test was applied in State v. Carter, 229 Wis.2d 200, 598 N.W.2d 619 (Ct. App. 1999), to hold that a parking lot of a closed gas station was also "held out to the public."

"The roadways of the Geneva National Community [a gated community] were 'held out to the public for use of their motor vehicles' because on any given day any licensed driver could enter the community unchallenged. . ." State v. Tecza, 2008 WI App 79, ¶22, 312 Wis.2d 395, 751 N.W.2d 896.

The Committee Notes to the 1957 revision of the Motor Vehicle Code provide as follows with respect to § 346.61:

> Legislative Council Note, 1957: Most provisions of this chapter are applicable only upon highways. This section gives the sections relating to reckless and drunken driving somewhat broader applicability. They will apply in such areas as parking lots, filling stations and loading platforms. This is a change in the law, for the attorney general has ruled that the present law relating to drunken driving applies only to driving on highways. 38 Att'y Gen. 184 (1949). Broader applicability, however, is in the interest of public safety and also is consistent with § 11-101 of the UVC. [Bill 99-S]

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3. This alternative was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.

4. This alternative was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.

5. The Committee suggests adding this statement only in the case where there is a factual dispute about the area where the operating took place and evidence supports a finding that a private parking area was involved. The statement was added to both § 346.61 and § 346.66 by 1995 Wisconsin Act 127.

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2610 OPERATING A MOTOR VEHICLE WITHOUT A VALID OPERATOR'S LICENSE — CRIMINAL OFFENSE — § 343.05(3)(a)

Statutory Definition of the Crime

Section 343.05(3)(a) of the Wisconsin Statutes is violated by any person who operates a motor vehicle[1] upon a highway of this state when that person does not hold a valid operator's license.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[2] upon a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant did not hold a valid operator's license at the time the defendant operated the motor vehicle.

   [(A cancelled) (An expired) license is not a valid license. It makes no difference whether the defendant knew the license (had been cancelled) (had expired).][5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2610 was originally published in 1980 and revised in 1986, 1995, and 2007. This revision was approved by the Committee in March 2012; it made minor changes in the text and updated the Comment.

This instruction is for second or subsequent violations of § 343.05(3)(a), which are crimes. See § 343.05(5)(b)1. As with operating under the influence offenses, the fact of a prior conviction is not an element of the criminal offense. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

This instruction applies only to operating without a valid license. Subsection (6) of § 343.05 provides that § 343.44 applies to any person operating a motor vehicle upon a highway when the person's license has been revoked or suspended. See Wis JI-Criminal 2620 through 2623. Felony penalties apply to violations of § 343.05 causing great bodily harm or death. See Wis JI-Criminal 2612. The felony penalties were created by 2011 Wisconsin Act 113 [effective date: March 1, 2012]. Act 113 did not affect the penalties for this offense.

A first offense under § 343.05 is a civil forfeiture. To use this instruction for the forfeiture offense, modify the instruction by substituting "to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "beyond a reasonable doubt." It may also be necessary to change the reference from "the state" to the unit of government that is prosecuting the case. See Wis JI-Criminal 2680 for a model.

Operating a motorcycle without a motorcycle endorsement or operating a moped or motor bicycle without a license is always a forfeiture. Neither ever becomes a criminal violation. See § 343.05(3)(b) and (5)(c).

Section 343.05(4) provides for a number of exemptions to the licensing requirements of Chapter 343.

1. Section 343.05(3)(a) applies to a person who operates "a motor vehicle which is not a commercial motor vehicle." The exclusion for non-commercial vehicles is not included in the instruction because the Committee concluded that the vehicle's status would rarely be an issue in the case. Offenses involving commercial motor vehicles are covered by sub. (2) of § 343.05.

2. Section 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

3. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

4. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Also see Wis JI-Criminal 2600, Sec. III.

5. Use material in brackets only when the issue of a cancelled or expired license is in the case.

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2612 OPERATING A MOTOR VEHICLE WITHOUT A VALID OPERATOR'S LICENSE: CAUSING GREAT BODILY HARM OR DEATH — CRIMINAL OFFENSE — § 343.05(3)(a)

Statutory Definition of the Crime

Section 343.05(3)(a) of the Wisconsin Statutes is violated by any person who operates a motor vehicle[1] upon a highway of this state when that person knows that (he) (she) does not hold a valid operator's license and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[2] upon a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant knew that (he) (she) did not hold a valid operator's license at the time the defendant operated the motor vehicle.[5]

   [(A cancelled) (An expired) license is not a valid license.][6]

3. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[7]

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["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2612 was originally published in 2007. This revision was approved by the Committee in March 2012; it updated the Comment to reflect changes made by 2011 Wisconsin Act 113.

This instruction is for violations of §343.05(3)(a) causing great bodily harm or death, which are punished as felonies. See Wis JI-Criminal 2610 for violations of § 343.05 that are criminal because they are second or subsequent violations. The felony penalties were created by 2011 Wisconsin Act 113 [effective date: March 1, 2012]. Causing great bodily harm is a Class I felony; causing death is a Class H felony. See § 343.05(5)(b)4. and 5. Both offenses require that the "person knows at the time of operation that he or she does not possess a valid operator's license." If the person does not have the required knowledge, the offenses are punished as forfeitures.

Subsection (6) of § 343.05 provides that § 343.44 applies to any person operating a motor vehicle upon a highway when the person's license has been revoked or suspended. See Wis JI-Criminal 2620 through 2623.

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1. Section 343.05(3)(a) applies to a person who operates "a motor vehicle which is not a commercial motor vehicle." The exclusion for non-commercial vehicles is not included in the instruction because the Committee concluded that the vehicle's status would rarely be an issue in the case. Offenses involving commercial motor vehicles are covered by sub. (2) of § 343.05.

2. Section 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

3. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

4. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Also see Wis JI-Criminal 2600, Sec. III.

5. Knowledge that the person does not possess a valid license is required by § 343.05(5)(b)4. and 5. In the absence of the required knowledge, the violations are punished as forfeitures.

6. Use material in brackets only when the issue of a cancelled or expired license is in the case.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

8. See § 939.22(14) and Wis JI-Criminal 914.

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THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE JANUARY 1, 2010.

2620 OPERATING WHILE REVOKED: CRIMINAL OFFENSE: BASED ON PRIOR CONVICTION — § 343.44(1)(b)[1]

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[2] on a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant's operating privilege[5] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][6]

3. The defendant knew (his) (her) operating privilege had been revoked.[7]

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Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING:[8]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2620 was originally published in 1978 and was revised in 1981, 1982, 1994, and 2006. This revision was approved by the Committee in October 2009.

This instruction applies to one type of criminal violation of § 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005]. Under Act 25, operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked, the offense addressed by this instruction; and, when the revocation "resulted from an offense that may be counted under s.

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343.307(2)," [see Wis JI-Criminal 2621]. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010. So this instruction is not to be used for offenses committed after that date. Those offenses will be forfeitures; see Wis JI-Criminal 2621A.

The fact of the prior conviction is not an "element" of this offense. That falls under the exception to the general rule that all facts that increase the statutory maximum penalty are for the jury. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

1. This instruction applies to operating while revoked offenses that were criminal because the defendant has a prior conviction for that offense. Second offenses were criminal violations until changes made by 2009 Wisconsin Act 28 took effect on January 1, 2010. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if they were second offenses or if the revocation resulted from an OWI-related offense. [See Wis JI-Criminal 2621.] The effective date of Act 25 was July 27, 2005. 2009 Wisconsin Act 28 eliminated the criminal penalty for second and subsequent OAR violations.

2. Regarding the definition of "motor vehicle," see § 340.01(35) and Wis JI-Criminal 2600, Introductory Comment, Sec. II.

3. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

4. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

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Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

5. Subsection 340.01(40) defines "operating privilege" as follows:

"Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

6. Subsection 343.44(1g) provides:

Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

7. The requirement that the person "knowingly operate" while revoked was added to § 343.44 by 1997 Wisconsin Act 84. This appears to codify the more demanding of two alternative mental elements established for operating while revoked offenses by the Wisconsin Supreme Court in State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977). Collova held that the offense required either that the person "knew" or "had cause to believe" that operating privileges had been revoked. The statute, as amended, codifies the more demanding requirement of actual knowledge of revocation, apparently eliminating "had cause to believe" as an alternative.

8. While the amendment of § 343.44 by 1997 Wisconsin Act 84 added "knowingly" to the definition of the offense, see note 7, supra, the act did not affect the provision regarding failure to receive mailed notice of revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation . . . mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation. . . ." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

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2620A OPERATING WHILE REVOKED: CRIMINAL OFFENSE[1]: REVOCATION RESULTED FROM AN OWI-RELATED OFFENSE — § 343.44(1)(b) and (2)(ar)2.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (two) (three)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[3] on a highway.[4]

   A motor vehicle is operated when it is set in motion.[5]

2. The defendant's operating privilege[6] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][7]

NOTE: THE DEFENDANT'S ADMISSION THAT THE REVOCATION WAS BASED ON AN OWI-RELATED OFFENSE DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THE THIRD ELEMENT.[8]

[3. The revocation resulted from an offense that may be counted under section 343.307(2).][9]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that (both) (all three) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2620A was approved by the Committee in April 2018; it reflects changes to § 343.44(1)(b) made by 2017 Wisconsin Act 127. [Note: A previously-published instruction also numbered Wis JI-Criminal 2620A was withdrawn in 2006.]

This instruction is to be used for offenses committed on or after December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed before that date see Wis JI-Criminal 2621.

Under section 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005], operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked [see Wis JI-Criminal 2620]; and, when the revocation "resulted from an offense that may be counted under s. 343.307(2)," the offense addressed by this instruction. [The captions in the instruction and the Comment refer to this as revocation "for an OWI-related offense."] Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

This requirement is reflected in the third element of the instruction. That element is in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C and Wis JI-Criminal 2600, Sec. IX.

1. This instruction applies to operating while revoked offenses that are criminal because the revocation "resulted from an offense that may be counted under s. 343.307(2)." The Committee has concluded that this is a fact for the jury, unless admitted by the defendant. See note 8, below. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if the revocation resulted from an OWI-related offense, addressed by this instruction, or if they were second

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offenses. [See Wis JI-Criminal 2620.] The effective date of Act 25 was July 27, 2005. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

2. The instruction is drafted to allow for use with either two or three elements, depending on whether the third element, relating to the cause of the revocation, is submitted to the jury. See note 8, below.

3. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

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7. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

8. The third element has been placed in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The element is in brackets because the Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C, and State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

9. This element is not to be included if the defendant admits that the revocation was OWI-related. See note 8, supra.

The text of the third element is based on the text of s. 343.44(2)(ar)2. The types of convictions, suspensions, and revocations that are counted under s. 343.307(2) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions.

The Committee concluded that the instruction should use the statutory language "may be counted under s. 343.307(2)" because evidence of the cause of the revocation will usually be submitted with testimony that the cause is one that is counted under that statute.

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2620A Operating A Motor Vehicle After Revocation or Suspension — Civil Forfeiture [© 1994]

2620B Reason To Know Privileges Were Revoked: Notice Mailed [© 1994]

2620C Reason To Know Privileges Were Revoked: Duty To Exercise Due Care [© 1994]

[INSTRUCTIONS WITHDRAWN]

COMMENT

Wis JI-Criminal 2620A, -B, and -C were most recently published in 1994. Their withdrawal was approved by the Committee in February 2006.

These instructions addressed Operating After Revocation offenses under §343.44 as it existed before being revised by 1997 Wisconsin Act 84. The instructions applied to offenses committed before August 1, 2000.

Section 343.44 was revised again by 2005 Wisconsin Act 25, which had an effective date of July 27, 2005. For instructions for violations of §343.44 committed on or after that date, see Wis JI-Criminal 2620-2622:

2620 Operating While Revoked – Criminal Offense: Based on Prior Conviction – §343.44(1)(b)

2621 Operating While Revoked – Criminal Offense: Revocation Resulted From an OWI-Related Offense – §343.44(1)(b)

2621A Operating While Revoked – Civil Forfeiture – §343.44(1)(b)

2622 Operating While Suspended – Civil Forfeiture – §343.44(1)(a)

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THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED AFTER JANUARY 1, 2010 AND BEFORE DECEMBER 10, 2017.

2621 OPERATING WHILE REVOKED: CRIMINAL OFFENSE[1]: REVOCATION RESULTED FROM AN OWI-RELATED OFFENSE — § 343.44(1)(b)

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (three) (four)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[3] on a highway.[4]

   A motor vehicle is operated when it is set in motion.[5]

2. The defendant's operating privilege[6] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][7]

3. The defendant knew (his) (her) operating privilege had been revoked.[8]

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NOTE: THE DEFENDANT'S ADMISSION THAT THE REVOCATION WAS BASED ON AN OWI-RELATED OFFENSE DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THE FOURTH ELEMENT AND PROCEED TO THE PARAGRAPH CAPTIONED "DECIDING ABOUT KNOWLEDGE."[9]

[4. The revocation resulted from an offense that may be counted under section 343.307(2).][10]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING:[11]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (three) (four) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2621 was originally published in 2001 and revised in 2006, 2010, and 2013. This revision was approved by the Committee in April 2018.

The 2018 revision added the caution at the top of page one to make it clear that this instruction should only be used for offenses committed before December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed on or after that date see Wis JI-Criminal 2620A.

This instruction is drafted for a criminal violation of § 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005]. Under Act 25, operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked [see Wis JI-Criminal 2620]; and, when the revocation "resulted from an offense that may be counted under s. 343.307(2)," the offense addressed by this instruction. [The captions in the instruction and the Comment refer to this as revocation "for an OWI-related offense."] Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

This requirement is reflected in the fourth element of the instruction. That element is in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C and Wis JI-Criminal 2600, Sec. IX.

1. This instruction applies to operating while revoked offenses that are criminal because the revocation "resulted from an offense that may be counted under s. 343.307(2)." The Committee has concluded that this is a fact for the jury, unless admitted by the defendant. See note 9, below. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if the revocation resulted from an OWI-related offense, addressed by this instruction, or if they were second offenses. [See Wis JI-Criminal 2620.] The effective date of Act 25 was July 27, 2005. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

2. The instruction is drafted to allow for use with either three or four elements, depending on whether the fourth element, relating to the cause of the revocation, is submitted to the jury. See note 9, below.

3. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

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4. "Highway" is defined by subsec. 340.01(22):

(22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

6. Subsection 340.01(40) defines "operating privilege" as follows:

"Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

7. Subsection 343.44(1g) provides:

Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

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Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

8. The requirement that the person "knowingly operate" while revoked was added to § 343.44 by 1997 Wisconsin Act 84. This appears to codify the more demanding of two alternative mental elements established for operating while revoked offenses by the Wisconsin Supreme Court in State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977). Collova held that the offense required either that the person "knew" or "had cause to believe" that operating privileges had been revoked. The statute, as amended, codifies the more demanding requirement of actual knowledge of revocation, apparently eliminating "had cause to believe" as an alternative.

9. The fourth element has been placed in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that the fact that the revocation "resulted from an offense that may be counted under s. 343.307(2)" is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D.

The element is in brackets because the Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI-Criminal 2660C, and State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

10. This element is not to be included if the defendant admits that the revocation was OWI-related. See note 9, supra.

The text of the fourth element is based on the text of s. 343.44(2)(ar)2. The types of convictions, suspensions, and revocations that are counted under s. 343.307(2) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions.

The Committee concluded that the instruction should use the statutory language "may be counted under s. 343.307(2)" because evidence of the cause of the revocation will usually be submitted with testimony that the cause is one that is counted under that statute.

11. While the amendment of § 343.44 by 1997 Wisconsin Act 84 added "knowingly" to the definition of the offense, see note 8, supra, the act did not affect the provision regarding failure to receive mailed notice of revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation . . . mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation. . . ." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

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2621A OPERATING WHILE REVOKED: CIVIL FORFEITURE[1] — § 343.44(1)(b) and (2)(ar)1.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)[2] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That the State Must Prove

1. The defendant operated a motor vehicle[3] on a highway.[4]

   A motor vehicle is operated when it is set in motion.[5]

2. The defendant's operating privilege[6] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][7]

Jury's Decision

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2621A was originally published in 2001 and revised in 2006 and 2010. This revision was approved by the Committee in April 2018.

The 2018 revision modified the instruction to be used for offenses committed on or after December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b).

1. This instruction applies to first offense operating while revoked offenses committed after July 27, 2005, if the revocation was not based on an operating while intoxicated-related offense.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. Regarding the definition of "motor vehicle," see § 340.01(35) and Wis JI-Criminal 2600, Introductory Comment, Sec. II.

4. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

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6. Section 340.01(40) defines "operating privilege" as follows:

"Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

7. Section 343.44(1g) provides:

Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

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2622 OPERATING WHILE SUSPENDED: CIVIL FORFEITURE — § 343.44(1)(a)

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly suspended.

Burden of Proof

Before you may find the defendant guilty of this offense, the (identify prosecuting agency) [1] must prove by evidence which satisfies you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

Elements of the Offense That the State Must Prove

1. The defendant operated a motor vehicle[2] on a highway.[3]

   A motor vehicle is operated when it is set in motion.[4]

2. The defendant's operating privilege[5] was duly suspended at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains suspended until it is reinstated.][6]

Proof that the defendant knew (his) (her) operating privilege had been suspended is not required.[7]

IF THERE IS EVIDENCE THAT A NOTICE OF SUSPENSION WAS PROPERLY MAILED, ADD THE FOLLOWING:[8]

[Refusal to accept) (Failure to receive) an order of suspension is not a defense.]

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Jury's Decision

If you are satisfied beyond a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH CAUSING GREAT BODILY HARM OR DEATH[9]

If you find the defendant guilty, answer the following question:

"Did the defendant's operation of the vehicle cause (great bodily harm) (death) to (name of victim) ?

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[10]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][11]

Before you may answer "yes," you must be satisfied to a reasonable certainty by evidence which is clear, satisfactory and convincing that the answer is "yes."

COMMENT

Wis JI-Criminal 2622 was originally published in 2001 and revised in 2006. This revision was approved by the Committee in March 2012; it was revised to reflect changes in penalties made by 2011 Wisconsin Act 113.

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The 2001 version of this instruction replaced Wis JI-Criminal 2620A for violations of § 343.44(1)(a) committed after August 1, 2000, when changes made by 1997 Wisconsin Act 84 took effect. After that date, all operating after suspension violations were punished as forfeitures.

The 2012 revision added a special question for offenses resulting in great bodily harm or death. 2011 Wisconsin Act 113 [effective date: March 1, 2012] created new forfeitures for those offenses: $5,000 to $7,500 forfeiture if great bodily harm is caused; $7,500 to $10,000 forfeiture if death is caused. See § 343.44(2)(ag)2. and 3. If the actor knew his or her operating privilege was suspended, the offenses are punished as felonies. See Wis JI-Criminal 2623A.

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

2. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

3. Subsection 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

4. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

5. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

6. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

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Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

7. Subsection (1)(a) of § 343.44 includes the following:

A person's knowledge that his or her operating privilege is suspended is not an element of the offense under this paragraph.

8. See § 343.44(3). Because the offense definition does not require that the person "knowingly" operate while suspended, the jury may be told that failure to receive a mailed notice is not a defense. Compare note 8, Wis JI-Criminal 2621, discussing this issue with respect to operating while revoked offenses, which do have "knowingly" as an element.

9. 2011 Wisconsin Act 113 [effective date: March 1, 2012] created new forfeitures for offenses resulting in great bodily harm or death: $5,000 to $7,500 forfeiture if great bodily harm is caused; $7,500 to $10,000 forfeiture if death is caused. See § 343.44(2)(ag)2. and 3. The Committee recommends submitting the degree of harm caused as a special question. The following should be added to the standard verdict form:

If you find the defendant guilty, answer the following question "yes" or "no":

"Did the defendant's operation of the vehicle cause (great bodily harm) (death) to (name of victim)?

10. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

11. See § 939.22(14) and Wis JI-Criminal 914.

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2623 OPERATING WHILE REVOKED OR SUSPENDED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(2)(g) or (h)

[INSTRUCTION WITHDRAWN]

COMMENT

Wis JI-Criminal 2623 was originally published in 2007. It was withdrawn in 2013 and replaced with Wis JI-Criminal 2623A and 2623B.

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2623A OPERATING WHILE SUSPENDED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(a) and (2)(ag)2. and 3.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly suspended and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway.[2]

   A motor vehicle is operated when it is set in motion.[3]

2. The defendant's operating privilege[4] was duly suspended at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains suspended until it is reinstated.][5]

3. The defendant knew (his) (her) operating privilege had been suspended.[6]

4. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[7]

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["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF SUSPENSION WAS PROPERLY MAILED, ADD THE FOLLOWING:[9]

[(Refusal to accept) (Failure to receive) an order of suspension is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been suspended. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been suspended regardless of whether the defendant received written notice of suspension.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2623 was originally published in 2007. It was separated into two instructions in 2012: this instruction for operating while suspended offenses and Wis JI-Criminal 2623B for operating while revoked offenses. This instruction was approved by the Committee in June 2012; the Comment was also updated to reflect changes in penalties made by 2011 Wisconsin Act 113.

This instruction is for violations of § 343.44(1)(a) — operating while suspended — where great bodily harm or death is caused. These violations are punished as felonies pursuant to provisions created by 2011 Wisconsin Act 113 [effective date: March 1, 2012] if the person knew at the time of operation that his or her operating privilege had been suspended. Causing great bodily harm is a Class I felony; causing death is a Class H felony. See §343.44(2)(ag)2. and 3. for the penalties for operating while suspended offenses.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

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Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. Knowledge that the person's operating privilege has been suspended is required by the penalty provisions in § 343.44(2)(ag)2. and 3. If the knowledge element is lacking, offenses resulting in death or great bodily harm are forfeitures.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

8. See § 939.22(14) and Wis JI-Criminal 914.

9. While the statutes require knowledge that privileges had been suspended, see note 6, supra, there has been no change in the provision regarding failure to receive mailed notice of suspension or revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation, suspension or disqualification mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation, suspension or disqualification." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while suspended. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

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THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE DECEMBER 10, 2017.

2623B OPERATING WHILE REVOKED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(b) and (2)(ar)3. and 4.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who knowingly operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway.[2]

   A motor vehicle is operated when it is set in motion.[3]

2. The defendant's operating privilege[4] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][5]

3. The defendant knew (his) (her) operating privilege had been revoked.[6]

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4. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim).

"Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[7]

["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][8]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

IF THERE IS EVIDENCE THAT A NOTICE OF REVOCATION WAS PROPERLY MAILED, ADD THE FOLLOWING:[9]

[(Refusal to accept) (Failure to receive) an order of revocation is not, by itself, a defense, but it is relevant to whether the defendant knew (his) (her) operating privileges had been revoked. The State must prove beyond a reasonable doubt that the defendant knew (his) (her) operating privileges had been revoked regardless of whether the defendant received written notice of revocation suspension.]

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2623 was originally published in 2007. It was separated into two instructions in 2012: this instruction for operating while revoked offenses and JI 2623A for operating while suspended offenses. The Comment was updated in 2013 to reflect changes in penalties made by 2011 Wisconsin Act 113. The 2017 revision was approved by the Committee in August 2017; it added the reference to State v. Villamil, 2017 WI 74 to the Comment.

The 2018 revision was approved by the Committee in April 2018; it added the caution at the top of page one to make it clear that this instruction should only be used for offenses committed before December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed on or after that date see Wis JI-Criminal 2623C.

This instruction is for violations of § 343.44(1)(b) — operating while revoked — where great bodily harm or death is caused. These violations may be punished as either misdemeanors or felonies pursuant to provisions created by 2011 Wisconsin Act 113 [effective date: March 1, 2012]. See § 343.44(2)(ar)3. and 4. This penalty anomaly apparently resulted from inadvertence.

The anomaly is that the penalty provisions purport to increase the penalty from a misdemeanor to a felony based on the fact that the defendant knew his or her operating privilege was revoked. However, the offense definition already requires that the defendant "knowingly operated"; the Committee has concluded that "knowingly operated" can only mean "knowledge that the privilege was revoked." Thus, subsections § 343.44(2)(ar)3. and 4. provide for both a misdemeanor and a felony penalty for offenses that have the same elements. The United States and Wisconsin supreme courts have held that there is no constitutional violation where crimes have the same elements but different penalties. In State v. Cissell, 127 Wis.2d 205, 378 N.W.2d 691 (1985), the court dealt with two 1983 statutes relating to nonsupport, one with a misdemeanor penalty and one with a felony penalty. The trial court dismissed felony charges against Cissell, concluding that the crimes had identical elements and that charging the defendant with a felony deprived him of his rights to due process and equal protection. The Wisconsin Supreme Court reversed, agreeing that the two crimes had identical elements, but concluding that ". . . identical element crimes with different penalties do not violate due process or equal protection." 127 Wis.2d 205, 215. The court relied on United States v. Batchelder, 442 U.S. 114 (1979), which addressed two federal statutes prohibiting felons from receiving firearms. One statute had a five year maximum penalty and the other a two year maximum. The court held that there was no constitutional violation: the statutes were clear and thus gave notice; a prosecutor's choice under these statutes is no different from the regular choice exercised in deciding what to charge; being influenced by the penalties does not give rise to a constitutional issue. Prosecutors can choose to prosecute

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under either statute as long as there is no discrimination against any class of defendants as prohibited by selective enforcement principles.

The situation under the current operating while revoked penalty provisions appears to the Committee to be indistinguishable from the situations addressed in the Cissell and Batchelder cases.

The Committee's conclusion is consistent with the decision reached in State v. Villamil, 2017 WI 74, 371 Wis.2d 519, 885 N.W.2d 381:

> ¶49 Whether there is one criminal statute or two, both this case and Cissell involve criminal statutes with substantially identical elements where prosecutors have discretion to decide whether they will charge a defendant with a misdemeanor or a felony. Although a defendant could be charged with a misdemeanor instead of a felony for a knowing violation of OAR-causing death, the public is on notice that this offense may be punished as a Class H felony pursuant to Wis. Stat. §§ 343.44(1)(b) and (2)(ar)4. Because Villamil knew he was operating after his license was revoked, the statutes provide sufficient notice that this violation could be charged as a felony.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

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5. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. Knowledge that the person's operating privilege has been revoked is part of the offense definition in § 343.44(1)(b), which requires that the person "knowingly operate." The knowledge requirement is also part of the penalty provisions for operating while revoked offenses in § 343.44(2)(ar)3. and 4. The Committee concluded that this redundancy is inadvertent. See discussion in the Comment preceding footnote 1.

7. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

8. See § 939.22(14) and Wis JI-Criminal 914.

9. While the statutes require knowledge that privileges had been revoked, see note 6, supra, there has been no change in the provision regarding failure to receive mailed notice of suspension or revocation. Subsection (3) of § 343.44 continues to provide that "[r]efusal to accept or failure to receive an order of revocation, suspension or disqualification mailed by 1st class mail to such person's last-known address shall not be a defense to the charge of driving after revocation, suspension or disqualification." The Committee concluded that the proper way to address the mailed notice issue is to advise the jury that failure to receive a properly mailed notice is not by itself a defense, but that the state must prove, by whatever evidence is relevant to the issue, that the defendant did knowingly operate while revoked. This may be accomplished by showing any source of actual knowledge, such as notice given by a judge, receipt of a mailed notice, etc.

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2623C OPERATING WHILE REVOKED: CRIMINAL OFFENSE: CAUSING GREAT BODILY HARM OR DEATH — § 343.44(1)(b) and (2)(ar)3. and 4.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is duly revoked and causes (great bodily harm) (death).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway.[2]

   A motor vehicle is operated when it is set in motion.[3]

2. The defendant's operating privilege[4] was duly revoked at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][5]

3. The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the (great bodily harm) (death).[6]

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["Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury.][7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I OR H FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.[8]

If you find the defendant guilty, you must answer the following question:

Did the defendant know at the time of the violation that (his) (her) operating privilege was revoked?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2623C was approved by the Committee in April 2018; it reflects changes to § 343.44(1)(b) made by 2017 Wisconsin Act 127.

This instruction is for violations of § 343.44(1)(b) — operating while revoked — where great bodily harm or death is caused. It is to be used for offenses committed on or after December 10, 2017. That date

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is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed before that date see Wis JI-Criminal 2623B.

While Act 127 deleted the knowledge requirement from the offense definition, it retained it in the penalty section. An offense resulting in great bodily harm is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class I felony. See § 343.44(2)(ar)3. An offense resulting in death is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class H felony. See § 343.44(2)(ar)4. This instruction may be used for either misdemeanor or felony charges; it includes a special question for felonies regarding the knowledge requirement.

Note: Deleting the knowledge requirement from the offense definition eliminated the penalty anomaly under prior law whereby misdemeanor and felony violations had the same elements. See the Comment to Wis JI-Criminal 2663B.

1. Subsection 340.01(35) defines "motor vehicle." Also see Wis JI-Criminal 2600, Sec. II.

2. Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

3. This instruction has always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. Subsection 343.44(1g) provides:

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> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

6. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

7. See § 939.22(14) and Wis JI-Criminal 914.

8. The special question addresses the penalty-increasing facts in § 353.44(2)(ar)3. and 4. A violation of § 343.44(1)(b) resulting in great bodily harm is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class I felony. See § 343.44(2)(ar)3. An offense resulting in death is punishable by a fine and up to a year in the county jail **unless the defendant knows** his or her privilege was revoked – then it is a Class H felony. See § 343.44(2)(ar)4.

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2626 OPERATING WHILE REVOKED: CRIMINAL OFFENSE: PERMANENT REVOCATION — § 343.44(1)(b) and (2)(ar)2m.

Statutory Definition of the Crime

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while that person's operating privilege is permanently revoked.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle[1] on a highway.[2]

   A motor vehicle is operated when it is set in motion.[3]

2. The defendant's operating privilege[4] was permanently revoked[5] at the time the defendant operated a motor vehicle.

   [A person's operating privilege remains revoked until it is reinstated.][6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2626 was approved by the Committee in July 2018.

This instruction is to be used for offenses committed on or after December 1, 2018. That date is the effective date for 2017 Wisconsin Act 172, which created the crime of operating after permanent revocation. It applies only where the person has a previous conviction for this offense. The penalty is a fine of not more than $10,000 or imprisonment for not more than one year or both. § 343.44(2)(ar)2m.

The instruction refers to "permanent revocation" in place of the statutory reference to a revocation "under s. 343.31(1m)." That statute identifies "qualifying convictions" and other facts that provide the basis for the department of transportation to revoke the person's operating privilege permanently.

The Committee concluded that the fact that the revocation was permanent is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI-Criminal 2600, Sec. IV, D. The fact that the defendant has a prior conviction for the offense need not be submitted to the jury. See Apprendi..

1. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

2. "Highway" is defined by subsec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

3. Instructions for operating after revocation have always used "set in motion" as the definition of "operated." This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of "operate" for operating under the influence cases was changed. Subsection 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Because § 346.63(3)(b) definition is prefaced by the phrase "in this section," it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of "operate" unchanged in this instruction.

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Subsection 340.01(41), applicable to all motor vehicle code offenses, does define "operator" as "a person who drives or is in actual physical control of a vehicle."

Also see Wis JI-Criminal 2600 Introductory Comment, Sec. III.

4. Subsection 340.01(40) defines "operating privilege" as follows:

> "Operating privilege" means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

5. The instruction refers to "permanent revocation" in place of the statutory reference to a revocation "under s. 343.31(1m)." That statute identifies bases for the department of transportation to revoke the person's operating privilege permanently. The Committee concluded that the jury must find that the privilege was permanently revoked but that it need not make a finding of the basis for that permanent revocation.

6. Subsection 343.44(1g) provides:

> Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator's license issued under this chapter or of an operating privilege continues until the operator's license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department's duty to promulgate rules relating to determining the length of suspension periods.

Despite the revocation being "permanent," a person is eligible to apply for reinstatement after 10 years have elapsed." § 343.31(1m)(b) and (c).

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2630 OPERATING A MOTOR VEHICLE TO FLEE OR IN AN ATTEMPT TO ELUDE AN OFFICER — § 346.04(3)

Statutory Definition of the Crime

Section 346.04(3) of the Wisconsin Statutes is violated by a person who operates a motor vehicle[1] on a highway[2] after receiving a visual or audible signal from a (traffic officer) (federal law enforcement officer) (marked police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer) and knowingly (flees) (attempts to elude) any officer.

CHOOSE THE ALTERNATIVE SUPPORTED BY THE EVIDENCE. IF MORE THAN ONE ALTERNATIVE IS SUBMITTED, CONNECT THEM WITH "OR" AND SEE WIS-JI CRIMINAL 517, JURY AGREEMENT...[3]

[by willful[4] disregard of such signal so as to interfere with or endanger (the operation of the police vehicle) (the traffic officer) (other vehicles) (pedestrians)].

[by increasing the speed of the vehicle (in an attempt to elude) (to flee)].

[by extinguishing the lights of the vehicle (in an attempt to elude) (to flee)].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle on a highway[5] after receiving a (visual) (audible) signal from a (traffic officer) (federal law enforcement officer) (marked

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police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer).[6]

("Traffic officer" means every officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations.)[7]

2. The defendant knowingly[8] (fled) (attempted to elude) an officer[9]

[by willful[10] disregard of the visual or audible signal so as to (interfere with) (endanger) (the operation of the police vehicle) (the traffic officer) (other vehicles) (pedestrians)].

[by increasing the speed of the vehicle (in an attempt to elude) (to flee)].

[by extinguishing the lights of the vehicle (in an attempt to elude) (to flee)].

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF ONE OF THE MORE SERIOUS OFFENSES IDENTIFIED IN SEC. 346.17(3)(b), (c), OR (d) IS CHARGED AND THE

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EVIDENCE WOULD SUPPORT A FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT:[11]

[If you find the defendant guilty, you must answer the following question(s):

["Did the defendant's operating a vehicle (to flee) (in an attempt to elude) an officer result in[12] (bodily harm to[13]) (damage to the property of[14]) another?"

("Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.)]

["Did the defendant's operating a vehicle (to flee) (in an attempt to elude) an officer result in[15] great bodily harm[16] to another?"

"Great bodily harm" means serious bodily injury.]

["Did the defendant's operating a vehicle (to flee) (in an attempt to elude) an officer result in[17] death to another?"]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."].

COMMENT

Wis JI-Criminal 2630 was originally published in 1979 and revised in 1986, 1989, 1995, 1997, 2003, 2012, and 2014. This revision was approved by the Committee in December 2018; it revised the instruction to reflect changes in the statute made by 2017 Wisconsin Act 347.

2017 Wisconsin Act 347 [effective date: April 18, 2018, revised § 346.04(3) to add reference to "federal law enforcement officer" and further revised the offense definition to refer to "marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer."

For violations of § 346.04(2t), a misdemeanor offense, see Wis JI-Criminal 2632.

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The penalties for violation of § 346.04(3) are found in § 346.17(3) and read as follows as amended by 2001 Wisconsin Act 109:

346.17(3)(a) Except as provided in par. (b), (c) or (d), any person violating s. 346.04(3) is guilty of a Class I felony.

(b) If the violation results in bodily harm, as defined in s. 939.22(4), to another, or causes damage to the property of another, as defined in s. 939.22(28), the person is guilty of a Class H felony.

(c) If the violation results in great bodily harm, as defined in s. 939.22(14), to another, the person is guilty of a Class F felony.

(d) If the violation results in the death of another, the person is guilty of a Class E felony.

Wis JI-Criminal 2630 is designed to be used for offenses involving any of the penalties. The fact increasing the penalty is to be handled as an extra question to be submitted to the jury. See text of the instruction at note 11. The following form is suggested for the verdict:

"We, the jury, find the defendant guilty of operating a motor vehicle to flee or in an attempt to elude an officer under Wis. Stat. § 346.04, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

[Add the appropriate question.]"

1. Section 346.04(3) applies to all vehicles and is not restricted to "motor" vehicles. ["Vehicle" is defined in § 340.01(74); "motor vehicle" is defined in § 340.01(35).] Since the majority of cases will involve motor vehicles, the instruction has been drafted for those cases. "Motor" should be omitted where a motor vehicle is not involved.

2. Offenses defined in chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. Sec. 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in secs. 346.62 and 346.63; sec. 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

Section 340.01(22) defines "highway." Also see Wis JI-Criminal 2600, Sec. I.

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element.

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3. Choose the alternative supported by the evidence. Any one of the alternatives is sufficient to establish the second element – that the defendant knowingly fled or attempted to elude the officers. See State v. Beamon, 2013 WI 47, ¶35, 347 Wis.2d 559, 830 N.W.2d 681, discussed in footnote 9, below. Make the same choice in defining the second element.

If more than one alternative is submitted, connect them with "or" and consider giving an instruction on jury agreement. See Wis JI-Criminal 517 JURY AGREEMENT: EVIDENCE OF MORE THAN ONE ACT INTRODUCED TO PROVE ONE CHARGE.

4. Section 346.04(3) reads "willful or wanton" (emphasis added). The Committee omitted "or wanton," concluding that the phrase does not add anything substantial to the offense. If it appears that "or wanton" is appropriate to a given case, it should be added.

The Wisconsin Supreme Court discussed the meaning of "willful" in State v. Hanson, 2012 WI 4, 338 Wis.2d 243, 808 N.W.2d 390. Hanson claimed that he fled from the scene of a traffic stop because he feared for his safety. He argued that "willful" should be interpreted to require an evil intent. The court disagreed:

> . . . we decline to read Wis. Stat. § 346.04(3) as providing a good faith exception to compliance. The statute requires: a subjective understanding by the defendant that a person known by the defendant to be a traffic officer has directed the defendant to take a particular action, and with that understanding, the defendant chose to act in contravention of the officer's direction. This requirement does not include a showing that the defendant had an evil or scornful state of mind. 2012 WI 4, ¶27.

5. See note 2, supra.

6. The phrase "marked police vehicle" is not defined by statute or in case law. Where there is a dispute as to a vehicle's status as "marked," it is a factual question for the jury to determine under all the circumstances of the case.

In State v. Opperman, 156 N.W.2d 241, 456 N.W.2d 625 (Ct. App. 1990), the court held that facts showing a vehicle was equipped with red lights and siren were not sufficient by themselves to prove that a vehicle is a "marked vehicle."

The question of whether a person may be charged under § 346.04(3) for fleeing or attempting to elude an unmarked police vehicle was considered in a 1976 opinion of the attorney general, which follows.

> You state that a person in a motor vehicle attempted to elude an unmarked police car equipped with a red light on the dashboard or within the grillwork and a siren under the hood. The police car was driven by a traffic officer who turned on both the red light and the siren. You ask whether this violates sec. 346.04(3), Stats.,
>
> . . . (statute omitted)
>
> The intention of the legislature to exclude signals received from vehicles which are not marked as police vehicles is apparent. Many automobiles, some privately owned, which are not police vehicles, qualify as authorized emergency vehicles under the definition in sec. 340.01(3), Stats.,

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> and operators of other vehicles can hardly be expected to know whether the operators of such authorized emergency vehicles are traffic officers or not. The statute here involved requires that the offense be knowingly committed. It is, therefore, my opinion that sec. 346.04(3), Stats., was not violated under the circumstances you have presented unless the eluder knew that the signal from the unmarked vehicle was given by a traffic officer. This, of course, is a matter of proof.
>
> However, Sec. 346.19, Stats., requires that upon the approach of an authorized emergency vehicle giving audible signal by siren, the operator of a motor vehicle shall yield the right of way, drive to the right and stop. I conclude that this is the proper statute to invoke in the case of a driver who flees from an unmarked police vehicle.

65 Op. Att'y Gen. 27 (1976)..

7. This is the definition provided in § 340.01(70).

8. The "knowingly" element was discussed in State v. Sterzinger, 2002 WI App 171, 256 Wis.2d 925, 649 N.W.2d 677. The court concluded that "the scienter requirement of Wis. Stat. § 346.04(3) applies only to the first element of the offense, that a driver 'knowingly flee or attempt to elude' an officer. We also conclude that the statute does not require the operator of a fleeing vehicle to actually interfere with or endanger identifiable vehicles or persons; he or she need only drive in a manner that creates a risk or likelihood of that occurring." 2002 WI App 171, ¶2. The court stated that this interpretation is consistent with Wis JI-Criminal 2630, but the instruction does not actually make the clear distinction articulated in the decision.

9. "[T]he second element of Wis Stat. § 346.04(3) – that the defendant knowingly fled or attempted to elude an officer – may be demonstrated in one of three ways: (1) willful disregard of the signal so as to interfere with or endanger the officer, vehicles, or pedestrians; (2) increasing the speed of the vehicle; or (3) extinguishing the lights of the vehicle." State v. Beamon, 2013 WI 47, ¶35, 347 Wis.2d 559, 830 N.W.2d 681. (Citing State v. Sterzinger, 2002 WI App 171, 256 Wis.2d 925, ¶9, 649 N.W.2d 677.).

10. See note 4, supra.

11. 2001 Wisconsin Act 109 (effective date: February 1, 2003) revised § 346.17, which identifies the penalty for a violation of § 346.04(3). See the Comment preceding note 1, supra. The Committee concluded that the best way to handle the facts which increase the penalty is to submit a special question to the jury, asking whether the fact has been established beyond a reasonable doubt. This is the same way the question of value is handled in a theft case. See Wis JI-Criminal 1441.

12. Section 346.17(3) does not use the word "cause" but rather uses "results in." In State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), the court held that § 346.17(3) was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

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If definition of the causal requirement is necessary, something like the following might be added:

This requires that the defendant's operation of the vehicle (to flee) (in an attempt to elude) an officer was a substantial factor in producing (specify the harm that occurred).

13. Section 346.17(3)(b) provides that the definition of "bodily harm" in § 939.22(4) applies. That is the definition used in the instruction.

14. Section 346.17(3)(b) provides that the definition of "property of another" in § 939.22(28) applies: "'Property of another' means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property."

15. See note 12, supra.

16. Section 346.17(3)(c) provides that the definition of "great bodily harm" in § 939.22(14) applies. The Committee recommends defining the term in the manner used in the instruction. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

17. See note 12, supra.

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2632 RESISTING A TRAFFIC OFFICER BY FAILING TO STOP — § 346.04(2t)

Statutory Definition of the Crime

Section 346.04(2t) of the Wisconsin Statutes is violated by a person who operates a motor vehicle[1] on a highway,[2] and after receiving a visual or audible signal to stop his or her vehicle from a (traffic officer) (federal law enforcement officer) (marked police vehicle) (unmarked police vehicle that the person knows or reasonably should know is being operated by a law enforcement officer), knowingly resists the officer by failing to stop his or her vehicle as promptly as safety reasonably permits.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a motor vehicle on a highway.[3]
2. The defendant received a visual or audible signal to stop (his) (her) vehicle from a (traffic officer) (federal law enforcement officer) (marked police vehicle) (unmarked police vehicle that the defendant knew or reasonably should have known was being operated by a law enforcement officer).

   ("Traffic officer" means every officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations.)[4]

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3. The defendant knowingly resisted an officer by failing to stop (his) (her) vehicle as promptly as safety reasonably permits.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2632 was originally published in 2003. This revision was approved by the Committee in December 2018; it revised the instruction to reflect changes in the statute made by 2017 Wisconsin Act 347.

2017 Wisconsin Act 347 [effective date: April 18, 2018, revised § 346.04(2t) to add reference to "federal law enforcement officer" and further revised the offense definition to refer to "marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer."

Section 346.04(2t) was created by 2001 Wisconsin Act 109 which changed the penalties and created a misdemeanor offense. For offenses under § 346.04(3), see Wis JI-Criminal 2630.

This offense was created by the legislation that implemented the recommendations of the Criminal Penalties Study Committee. That Committee recommended that a misdemeanor fleeing offense be restored "for use in those cases when the defendant's behavior is appropriately addressed with a conviction other than at the felony level." Criminal Penalties Study Committee Final Report, p. 57 (Wisconsin Department of Administration, August 31, 1999.) [This report is available online at http://www.doa.state.wi.us/secy/index.asp.]

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Section 346.04(4) provides: "Subsection (2t) is not an included offense of sub. (3), but a person may not be convicted of violating both subs. (2t) and (3) for acts arising out of the same incident or occurrence."

1. Section 346.04 applies to all vehicles and is not restricted to "motor" vehicles. ["Vehicle" is defined in § 340.01(74); "motor vehicle" is defined in § 340.01(35).] Since the majority of cases will involve motor vehicles, the instruction has been drafted for those cases. "Motor" should be omitted where a motor vehicle is not involved.

2. Offenses defined in chapter 346 apply exclusively to operation upon "highways" unless otherwise expressly provided. Sec. 346.02(1). (An express provision does exist for reckless driving and operating under the influence offenses defined in secs. 346.62 and 346.63; sec. 346.61 provides that those statutes are applicable to "all premises held out to the public for use of their motor vehicles.")

"Highway" is defined in sec. 340.01(22) as:

> All public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools as defined in s. 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

This definition of "highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 334 N.W.2d 77 (1983).

The fact that the driving or operating took place on a highway is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for the finding of this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element. However, in a case where the "highway" issue is contested, it may help clarify the issue for the jury if the instruction is modified to treat that fact as a separate element

3. See note 2, supra.

4. This is the definition provided in § 340.01(70).

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2650 RECKLESS DRIVING: ENDANGERING SAFETY (CRIMINAL OFFENSE) — § 346.62(2)

Statutory Definition of the Crime

Reckless driving, as defined in § 346.62(2) of the Wisconsin Statutes, is committed by one who endangers the safety of any person or property by the negligent operation of a vehicle on a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle[3] on a highway.[4]

2. The defendant operated a vehicle in a manner constituting criminal negligence.[5]

   "Criminal negligence" means:[6]

   - the defendant's operation of a vehicle created a risk of death or great bodily harm; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

   IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[7]

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IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[8]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

3. The defendant's criminal negligence endangered the safety of any person or property.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2650 was originally published in 1967 and revised in 1978, 1985, 1988, and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Section 346.62(2) was modified by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. It was affected by the homicide revision because the same definition of "criminal negligence" is used for this offense as for homicide under the revision. The effective date of the change is January 1, 1989, and this instruction is to be used in place of Wis JI-Criminal 2650 (© 1986) for offenses committed on or after that date. The revised statute reads as follows:

(2) No person may endanger the safety of any person or property by the negligent operation of a vehicle.

The Judicial Council explained the change as follows:

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The revisions contained in subs. (2) and (3) are intended as editorial, not substantive, as is the substitution of a cross-reference to s. 939.25(2), stats., for the prior definition of a high degree of negligence. New sub. (4) carries forward the crime created by 1985 Wisconsin Act 293.

Judicial Council Note to § 346.62, 1987 Senate Bill 181.

The first offense under § 346.62(2) is punishable only by forfeiture of not less than $25 nor more than $200 [see § 346.65(1)(a)]; therefore, the burden of proof is to a reasonable certainty by evidence which is "clear, satisfactory, and convincing," (see § 345.45). The second and subsequent violations within four years are punishable as crimes: fine of $50 to $500 or one year in the county jail or both [see § 346.65(1)(b)]. Therefore, for second and subsequent offenses, the burden of proof must be beyond a reasonable doubt.

The instruction is drafted for the criminal offense. To adapt it for a forfeiture case, substitute "satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "prove by evidence which satisfies you beyond a reasonable doubt." If the "clear, satisfactory, and convincing" standard of proof applies, an instruction for a 5/6 verdict should also be given. See Wis JI-Criminal 2055, Five-Sixths Verdict: Forfeiture Actions.

Section 346.62(5m) provides for doubling the forfeiture or fine for certain violations:

If an operator of a vehicle violates s. 346.62(2) to (4) where persons engage in work in a highway maintenance or construction area or in a utility work area are at risk from traffic, any applicable minimum and maximum forfeiture or fine specified in sub. (1), (3), (4m) or (5) for the violation shall be doubled.

A similar offense is defined in § 941.01, which prohibits "endangering another's safety by a high degree of negligence in the operation of a vehicle, <u>not upon a highway</u>." (Emphasis added.) See Wis JI-Criminal 1300.

1. Section 346.61 provides that § 346.62 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public. . . ," the instruction must be modified. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." See Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The definition of "vehicle" provided in § 939.22(44), applies to violations of § 346.62. See § 346.62(1)(d). It provides:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air.

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4. If a case involves operating on "premises held out for the public" rather than on a "highway," see discussion in note 2, above. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. I. and Wis JI-Criminal 2605.

5. Section 346.62(1) provides: "'Negligent' has the meaning designated in s. 939.25(2)." This is a reference to the Criminal Code definition of "criminal negligence."

6. The definition of "criminal negligence" is the one provided in § 939.25, which applies to this offense. See § 346.62(1)(c).

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

8. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

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2652 RECKLESS DRIVING: CAUSING BODILY HARM — § 346.62(3)

Statutory Definition of the Crime

Reckless driving, as defined in § 346.62(3) of the Wisconsin Statutes, is committed by one who causes bodily harm to another by the negligent operation of a vehicle on a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle[3] on a highway.[4]

2. The defendant operated a vehicle in a manner constituting criminal negligence.[5]

   "Criminal negligence" means:[6]

   - the defendant's operation of a vehicle created a risk of death or great bodily harm; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

   IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[7]

   IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[8]

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[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

3. The defendant's criminal negligence caused bodily harm to (name of victim).

This requires that the defendant's conduct was a substantial factor in producing bodily harm.[9]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2652 was originally published in 1967 and revised in 1978, 1985, 1988, and 1995. This revision was approved by the Committee in June 2009 and involved adoption of a new format and nonsubstantive changes to the text.

Section 346.62(3) was modified by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. It was affected by the homicide revision because the same definition of "criminal negligence" is used for this offense as for homicide under the revision. The effective date of the change is January 1, 1989, and this instruction is to be used in place of Wis JI-Criminal 2652 (© 1986) for offenses committed on or after that date. The revised statute reads as follows:

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(2) No person may cause bodily harm to another by the negligent operation of a vehicle.

The Judicial Council explanation of the change is provided in the Comment to Wis JI-Criminal 2650.

A violation of § 346.62(3) is a crime, punishable by a fine of not less than $300 nor more than $2,000 or imprisonment of not less than 30 days or more than one year in the county jail. § 346.65(3).

Section 346.62(5m) provides for doubling the forfeiture or fine for certain violations:

> If an operator of a vehicle violates s. 346.62(2) to (4) where persons engage in work in a highway maintenance or construction area or in a utility work area are at risk from traffic, any applicable minimum and maximum forfeiture or fine specified in sub. (1), (3), (4m) or (5) for the violation shall be doubled.

1. Section 346.61 provides that § 346.62 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public. . . ," the instruction must be modified. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." See Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The definition of "vehicle" provided in § 939.22(44), applies to violations of § 346.62. See § 346.62(1)(d). It provides:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air.

4. If a case involves operating on "premises held out for the public" rather than on a "highway," see discussion in note 1, above. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. I. and Wis JI-Criminal 2605.

5. Section 346.62(1) provides: "'Negligent' has the meaning designated in s. 939.25(2)." This is a reference to the Criminal Code definition of "criminal negligence."

6. The definition of "criminal negligence" is the one provided in § 939.25, which applies to this offense. See § 346.62(1)(c).

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

8. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

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9. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

10. This is the definition of "bodily harm" provided by § 939.22(4), which applies to reckless driving offenses. § 346.62(1)(a).

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2654 RECKLESS DRIVING: CAUSING GREAT BODILY HARM — § 346.62(4)

Statutory Definition of the Crime

Reckless driving, as defined in § 346.62(4) of the Wisconsin Statutes, is committed by one who causes great bodily harm to another by the negligent operation of a vehicle on a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle[3] on a highway.[4]
2. The defendant operated a vehicle in a manner constituting criminal negligence.[5]

   "Criminal negligence" means:[6]

   - the defendant's operation of a vehicle created a risk of death or great bodily harm; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

   IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY SEE WIS JI-CRIMINAL 925.[7]

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IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[8]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

3. The defendant's criminal negligence caused great bodily harm to (name of victim).

This requires that the defendant's conduct was a substantial factor in producing great bodily harm.[9]

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 2654 was originally published in 1988 and revised in 1995 and 2009. The 2009 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in 2018; it made nonsubstantive editorial corrections.

Section 346.62(4) was created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. It is former § 940.25, moved to line up with the closely related offenses defined in § 346.62(2) and (3). The effective date of the change is January 1, 1989, and this instruction is to be used in place of Wis JI-Criminal 1261 (© 1986) for offenses committed on or after that date. The revised statute reads as follows:

(4) No person may cause great bodily harm to another by the negligent operation of a vehicle.

The Judicial Council explanation of the change is provided in the Comment to Wis JI-Criminal 2650.

A violation of § 346.62(4) is a Class I felony. § 346.65(5).

Section 346.62(5m) provides for doubling the forfeiture or fine for certain violations:

If an operator of a vehicle violates s. 346.62(2) to (4) where persons engage in work in a highway maintenance or construction area or in a utility work area are at risk from traffic, any applicable minimum and maximum forfeiture or fine specified in sub. (1), (3), (4m) or (5) for the violation shall be doubled.

1. Section 346.61 provides that § 346.62 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public. . . ," the instruction must be modified. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." See Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The definition of "vehicle" provided in § 939.22(44), applies to violations of § 346.62. See § 346.62(1)(d). It provides:

"Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water or in the air.

4. If a case involves operating on "premises held out for the public" rather than on a "highway," see discussion in note 1, above. Also see, Wis JI-Criminal 2600 Introductory Comment, Sec. I. and Wis JI-Criminal 2605.

5. Section 346.62(1) provides: "'Negligent' has the meaning designated in s. 939.25(2)." This is a reference to the Criminal Code definition of "criminal negligence."

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6. The definition of "criminal negligence" is the one provided in § 939.25, which applies to this offense. See § 346.62(1)(c).

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

8. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

9. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient in most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

See Wis JI-Criminal 910 for a more complete discussion of "cause."

10. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

Section 346.62(1)b) provides: "'Great bodily harm' has the meaning designated in s. 93.22(14)."

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